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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Stephen G. Lady,

Petitioner,

v.

Neal Glaser Marine, Inc.; *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves the same issue raised by *Lewis v. Brunswick Corp.*, No. 97-288 (October Term, 1997), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998): whether common law tort claims that a boat was defectively designed because it lacked a propeller guard are preempted by federal law. In *Lewis*, the United States submitted an *amicus curiae* brief stating the federal government's view that such claims are not preempted. *Lewis*, however, settled after oral argument, before any decision was rendered. This case presents the first opportunity for the Court to consider this preemption issue since *Lewis*. The question presented is:

Whether the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1988 & Supp. 1993), preempts state common law claims that a recreational motor boat was defectively designed because it lacked a propeller guard when: (1) the Act expressly provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law" (46 U.S.C. § 4311(g)); (2) the U.S. Coast Guard has not adopted any standard or regulation with respect to propeller guards; and (3) the United States has taken the position that common law no-propeller-guard claims do not conflict with or otherwise frustrate any federal statutory or regulatory purpose?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioner Steven G. Lady (as appellant) and respondent Outboard Marine Corporation ("OMC") (as appellee).

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the 5th Circuit (App. 1-39) is reported at 228 F.3d 598 (5th Cir. 2000). The opinion of the district court (App. 40- 47) was entered on May 7, 1999.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The express "preemption clause" of the Federal Boat Safety Act of 1971, 46 U.S.C. § 4306 (1988), reads as follows:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

The express "savings clause" of the Federal Boat Safety Act of 1971, 46 U.S.C. § 4311(g) (1988), reads as follows:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

The Coast Guard has not issued any regulations governing propeller guards on recreational vessels. The agency did consider whether to begin the process of developing a regulation requiring propeller guards on recreational boats, but it decided not to do so. The Coast Guard's decision not to take any regulatory action with respect to such devices was not the subject of any formal rulemaking or agency publication.

STATEMENT OF THE CASE

This case presents the question of whether a state common law claim that a boat engine was defectively designed because it lacks a propeller guard is preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. § 4301-4311 (1988 & Supp. V. 1993) ("Boat Safety Act" or "Act"), and by a decision of the United States Coast Guard not to begin developing a regulation that would require the use of propeller guards on recreational motor boats. The Fifth Circuit held that such claims are impliedly preempted by federal law, even though the Coast Guard has never regulated propeller guards and even though the United States, in an *amicus curiae* brief filed with this Court, took the position that no-propeller-guard claims like petitioner's are not preempted by federal law. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288). In so doing, the lower court disregarded repeated teachings of this Court that the federal government's own view of the preemptive effect of agency regulations is entitled to at least

"substantial weight." *E.g., Medtronic v. Lohr, Inc.*, 518 U.S. 470, 496 (1996) (majority opinion); *id.* at 505-07 (Breyer, J., concurring). The Fifth Circuit's decision, which is in direct conflict with the Texas Supreme Court's holding in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), is the subject of this petition.

A. The Federal Statutory and Regulatory Framework

1. The Boat Safety Act.

The Boat Safety Act was enacted to "improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating – presently the Secretary of Transportation." S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1333. The Act provides that the Secretary of Transportation "may prescribe regulations establishing minimum safety standards for recreational vessels and associated equipment . . .." 46 U.S.C. § 4302(a)(1). This rulemaking authority has been transferred to the Commandant of the United States Coast Guard. *See* App. 9. The National Boating Safety Advisory Council (the "Advisory Council") is charged with assisting the Coast Guard in evaluating the need for safety regulations. 46 U.S.C. § 4302(c)(4).

Under the Act, the Coast Guard's authority to issue minimum safety standards is permissive, not mandatory. *Id. See also* S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1338. In addition, the Coast Guard is prohibited from establishing regulations that would

compel substantial alterations of existing boats unless compliance with those regulations would "avoid a substantial risk of personal injury to the public." 46 U.S.C. § 4302(c)(2). The Act sets forth the procedures that the Coast Guard must follow to prescribe such regulations, including the actual publishing of a proposed safety standard and the express provision of a future effective date after its initial publication. *See* 46 U.S.C. § 4302(b). Thus the Act

> requires certain actions by the [Coast Guard] in the development of safety standards . . . In addition to the specific procedural requirements outlined in the [Act], the [Coast Guard], in promulgating standards, is required to comply with the formal rulemaking procedures in the Administrative Procedure Act (5 U.S.C. 553).

S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1340. Under this scheme, any party adversely affected by a standard prescribed under the Act is entitled to seek judicial review of the standard in accordance with the Administrative Procedure Act. *Id.*

The Boat Safety Act also contains two provisions addressing the effect of Coast Guard regulations on state law. First, Congress included in the legislation an express preemption clause providing, in pertinent part, that:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment

> performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306. Second, Congress included an express *anti*-preemption provision, or savings clause, that expressly *preserves* all common law claims. It provides:

> [c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

46 U.S.C. § 4311(g).

Together, the preemption provision and the savings clause govern the preemptive effect of federal regulations issued pursuant to the Boat Safety Act.

2. The Coast Guard's Decision Not to Regulate Propeller Guards.

In 1988, at the Coast Guard's request, a subcommittee of the Advisory Council (the "Subcommittee") was formed to investigate the feasibility of requiring guards to prevent underwater propeller accidents and to opine whether "the Coast Guard [should] move towards a federal requirement for some form of propeller guard." App. 11. In November 1989, based in part on its conclusion that propeller guards "would not necessarily increase boat safety" (App. 15), the Subcommittee recommended that "the U.S. Coast Guard should take no

regulatory action to require propeller guards." App. 16. This recommendation was then adopted by the Advisory Council and forwarded to the Coast Guard for its consideration. App. 16.

On February 1, 1990, the Coast Guard adopted the Advisory Council's recommendation that it "take no regulatory action to require propeller guards." App. 16. In a letter setting forth the rationale underlying the agency's decision not to begin the formal regulatory process, Rear Admiral Robert T. Nelson explained the Coast Guard's position on propeller guards as follows:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

App. 16-17. Rear Admiral Nelson added, however, that the agency would "continue to collect and analyze accident data for changes and trends . . . [and] review and retain any information made available regarding development and testing of new propeller guarding devices . . ." *Id.* At no point did Rear Admiral Nelson's letter – or anything else issued by the Coast Guard – indicate that the agency had concluded that propeller guards are dangerous, or that it intended to preempt common

law claims relating to a manufacturer's failure to install propeller guards in its boats.

The Coast Guard's 1990 decision not to begin the process of developing a regulation to require propeller guards was not the product of any formal rulemaking proceeding and did not result in any regulatory action. The Coast Guard Letter describing the agency's decision not to regulate was not exposed to public notice and comment and it was never published in the *Federal Register*. Thus, there was no attempt to conform to the notice-and-comment rulemaking requirements of the Administrative Procedure Act. *See* 5 U.S.C. § 553 (1994). To date, there is still no federal regulation with respect to propeller guards, and their use is neither mandated nor prohibited by federal law.[1]

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[1] The Coast Guard has, however, continued to study various policy proposals to prevent propeller-related injuries. App. 17-18 n.12. In 1995, for example, the Coast Guard issued an Advance Notice of Proposed Rulemaking ("ANPRM") requesting comment on "the public's present feelings about the use of propeller guards on these vessels," a request occasioned by a serious accident involving a houseboat. *See* 60 Fed. Reg. 25,191 (1995). In 1996, the Coast Guard issued another ANPRM "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 12,123 (1996). And, in 1997, the Coast Guard sought "comments on the effectiveness and interventions which have been suggested for reducing the number of recreational boating accidents involving rented power boats in which individuals are injured by the propeller." 62 Fed. Reg. 22,991 (1997). Because it received few responses to that request, the Coast Guard extended the period for comments. *See* 62 Fed. Reg. 44,507 (1997). To date, the rulemaking is still open, and the Coast Guard is still considering what action, if any, to take with regard to propeller guards. *See* 64 Fed. Reg. 21,566 (1999).

B. The Proceedings Below

This case arose out of a boating accident in Mississippi state waters in which the petitioner, Steven G. Lady, was seriously injured by the propeller of a boat designed and manufactured by respondent Outboard Marine Corporation ("OMC"). App. 2. In a Mississippi state court complaint filed on March 11, 1998, Mr. Lady alleged that the boat was defectively designed because it lacked a propeller guard. Originally, the suit named as defendants both the retail distributor of the boat (Neal Glaser Marine, Inc.) and the boat manufacturer (OMC). Shortly after filing, Neal Glaser Marine, Inc. was voluntarily dismissed from the case, leaving only OMC as a defendant. OMC thereafter removed the case to the United States District Court for the Southern District of Mississippi, Southern Division, based on diversity jurisdiction. App. 3.

Shortly after removal, the case was placed on inactive status pending resolution of *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. granted*, 522 U.S. 978 (1998). That case, which raised the issue of whether no-propeller-guard claims like petitioner's are preempted, was then pending before this Court. As noted above, however, *Lewis* settled after oral argument but before any decision was rendered, and so this Court dismissed the petition for *certiorari*. *See* 523 U.S. 1113 (1998). After *Lewis* settled, OMC moved for summary judgment on the ground that Mr. Lady's claim is preempted by federal law. App. 3. The district court agreed, holding that the Coast Guard's decision not to require propeller guards expressly preempts common law claims. While acknowledging that the Coast Guard has never issued any regulations governing propeller guards, the court reasoned that the agency's

decision not to require propeller guards on all boats "takes on the character of a ruling that no such regulation is appropriate, and precludes states from imposing liability based on the absence of such guards . . .." App. 44 (citations and internal quotation marks omitted).

On appeal, the Fifth Circuit rejected the district court's express preemption ruling, but nonetheless held that petitioner's claims are impliedly preempted by federal law. At the outset, the court held that the case was not subject to the strong presumption against federal preemption that traditionally has been applied to health and safety issues – "matters that historically have been areas of state jurisdiction." App. 18 (quoting *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1023 (5th Cir. 1994)). Relying on this Court's recent decision in *United States v. Locke*, 529 U.S. 89, 120 S. Ct. 1135 (2000), which held that the presumption against preemption does not apply to cases involving international maritime commerce, the Fifth Circuit reasoned that "a presumption against preemption does not guide our analysis of whether federal law precludes Lady's common law tort claims against OMC." App. 21.

The lower court then considered the questions of express and implied preemption under the Boat Safety Act. Regarding the former, the court concluded that the Act's broadly-worded savings clause, which provides that "compliance with this chapter . . . does not relieve a person from liability at common law or under state law," precludes any finding of express preemption of common law claims. App. 27. The Fifth Circuit went on to hold, however, that petitioner's claims are impliedly preempted by federal law on the theory that a jury verdict finding OMC liable for not installing a propeller guard would frustrate the Coast Guard's regulatory

purposes. Despite its acknowledgment that the Coast Guard has never issued any regulations governing propeller guards (yet retains the authority to do so if it so chooses), the court found that the agency's regulatory inaction amounted to an affirmative decision to preclude any common law claims seeking to hold a manufacturer liable for failing to install propeller guards. In the court's view, "[a] damage award in favor of Lady would effectively require boat manufacturers to install propeller guards, in direct contravention to the Coast Guard's policy against mandating such a device in favor of affording manufacturers flexibility on the matter." App. 36 (citations omitted).

Notwithstanding its purported reliance on the agency's "policy" as a basis for its implied preemption ruling, the lower court chose to disregard the United States' only articulated view on the matter: the anti-preemption position set forth in the Solicitor General's *amicus curiae* brief in *Lewis*, which argued that "[t]he Coast Guard's conclusion in 1990 that the available data did not justify the issuance of regulations concerning propeller guards *is not a basis for implied conflict preemption of petitioners' common law tort claims*." Brief for the United States as *Amicus Curiae* Supporting Petitioners at 26, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288) (emphasis added). The *Lewis* brief emphasized that "[t]he Coast Guard has never formally determined that a requirement [of propeller guards] would be contrary to the interests of boat safety." *Id.* The United States further noted that,

> [i]f it had reached that conclusion, the Coast Guard may well have prohibited propeller guards. The Coast Guard stated only that the "available propeller guard accident data do not

support imposition of a regulation requiring propeller guards."

Id. Given this fact, and the absence of any federal regulation governing propeller guards, the United States concluded that the petitioners' claims did not in any way conflict with the federal regulatory scheme. *Id.* at 25-30.

In the face of these arguments, and despite its characterization of the implied preemption issue as an "extremely close one" (App. 35), the Fifth Circuit ultimately held that the United States' position in *Lewis* was not persuasive because "[t]he Solicitor General . . . has not appeared before us in this case" and, in any event, "the weight we would place on [the *Lewis* brief] would not be sufficient to overcome the reasons supporting the application of implied preemption." App. 38-39 n.22.

REASONS FOR GRANTING THE WRIT

I. This Case Presents the Same Federal Preemption Issue that the Court Considered in *Lewis*, But Could Not Resolve Because *Lewis* Settled After Oral Argument.

This case presents the same issue of federal preemption that was before the Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998): whether state common law tort claims that a boat was defectively designed because it lacked a propeller guard are preempted by federal law. In *Lewis*, the United States submitted an *amicus curiae* brief arguing that, because the Coast Guard never issued any

regulations relating to propeller guards, common law no-propeller-guard claims do not conflict with or undermine any federal regulatory purpose. Unfortunately, *Lewis* settled after oral argument, so no opinion was ever rendered in the case. *See* 523 U.S. 1113 (1998). The lower courts remain split on the issue, with one state supreme court (Texas) holding that no-propeller-guard claims are not preempted and a host of federal courts (including the Fifth Circuit in the decision below) holding just the opposite (*see infra* at II).

The decision below is the first opinion issued by a federal court of appeals in the wake of *Lewis*. (No state supreme court has since revisited the issue.) Although the Fifth Circuit agreed with petitioner that the Act does not expressly preempt no-propeller-guard claims, it held that such claims are impliedly preempted because the U.S. Coast Guard has considered taking, but ultimately decided not to take, regulatory action requiring propeller guards. In so doing, the lower court emphasized that the case presents a "close and difficult issue" as to which the lower courts remain deeply conflicted. App. 6. Review is warranted because this case presents the first opportunity since *Lewis* for this Court to resolve this important issue of federal law.

II. There is a Direct Split Between the Texas Supreme Court and Three Federal Courts of Appeals, Including the Decision Below, as to Whether No-Propeller-Guard Claims are Preempted by the Boat Safety Act.

Review is also warranted because there is a direct split between the Supreme Court of Texas and the Fifth Circuit Court of Appeals (along with two other federal circuit courts)

as to whether a common law claim that a manufacturer is liable for failing to equip its boats with propeller guards is preempted by the Boat Safety Act. This split creates the anomalous situation whereby the viability of no-propeller-guard claims in Texas depends entirely on whether a case proceeds in state or federal court.

In *Moore*, 889 S.W.2d 246, the Texas Supreme Court held that the Boat Safety Act neither expressly nor impliedly preempts no-propeller-guard claims. The court emphasized the strong presumption against federal preemption of state common law claims – a presumption that "particularly obtains when, as in this case, state regulation of health and safety matters is involved." *Id.* at 249 (citing *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715 (1985)). In light of this strong presumption against preemption, *Moore* rejected the boat manufacturers' claim that the reference to "law or regulation" in the Boat Safety Act's preemption provision encompasses – and expressly preempts – common law claims. 889 S.W.2d at 250.

The Texas Supreme Court also rejected the boat manufacturers' argument that the plaintiff's no-propeller-guard claims were impliedly preempted under the Act. *Id.* at 251. On this point, the defendants argued that "a jury award in this case will conflict with and undermine the goals of the Act by creating a standard requiring propeller guards, in the face of the Coast Guard's determination that guards should not be mandated." *Id.* The Texas Supreme Court disagreed, stating, first, that the Coast Guard's decision not to commence rulemaking did not "reflect an intention to foreclose state tort liability." *Id.*

As to the boat manufacturers' claim that preemption must be implied because permitting no-propeller-guard claims would undermine Congress' goal of creating uniform safety regulations, the Texas Supreme Court stated: "the [Act's] savings clause reflects that Congress was willing to tolerate some tension between the concept that uniform safety regulations should be established at the federal level and the concept that a state may nevertheless award tort damages for unsafe products." *Id.* at 252. This approach makes sense, in the Texas Supreme Court's view, because "the regulatory effect of damage awards is not equivalent to that of positive enactments: a manufacturer who incurs tort liability for failing to install propeller guards has a choice not available to the regulated manufacturer – installing guards on future boats or taking no action and bearing the liability as a cost of doing business." *Id.* at 251 (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988)).

The decision below is squarely in conflict with *Moore*. Although the two courts agree that there is no express preemption of common law claims under the Boat Safety Act (in light of the Act's savings clause), the Fifth Circuit split with *Moore* in holding that no-propeller-guard claims are impliedly preempted by the Coast Guard's regulatory inaction. To reach this conclusion, the Fifth Circuit began by abandoning a core proposition of law embraced in *Moore*: that such claims are subject to a strong presumption against federal preemption. *See* App. 18-21. Having jettisoned the presumption against preemption, the lower court went on to conclude – again directly contrary to the holding in *Moore* – that "[a] damage award in favor of Lady would effectively require boat manufacturers to install propeller guards" on recreational boats. App. 36. Such an outcome, the court held, "would frustrate the

Coast Guard's decision that recreational boats should not be required to be equipped with propeller guards." App. 6.

Thus, the decision below is manifestly at odds with the Texas Supreme Court's decision in *Moore*. In addition, as the Fifth Circuit recognized, this split is reflected in numerous other court decisions regarding the scope of preemption under the Boat Safety Act, including *Carstensen v. Brunswick Corp.*, 49 F.3d 430 (8th Cir.), *cert. denied*, 516 U.S. 866 (1995), and *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. dismissed*, 523 U.S. 1113 (1998). *See* App. 6 (collecting cases). Review is warranted here to finish the job started in *Lewis*: to resolve this split, prevent further confusion among the lower courts, and ensure that state common law claims that Congress intended to preserve are not preempted.

III. The Decision Below Conflicts with Relevant Decisions of this Court.

Review is also warranted because the lower court's ruling conflicts with decisions of this Court in at least three ways: first, it improperly affords preemptive effect to federal regulatory inaction; second, it improperly abandons the long-standing presumption against preemption; and, third, it fails to give any – let alone sufficient – weight to the federal government's own interpretation of the preemptive effect of the Coast Guard's decision not to regulate propeller guards.

A. The Lower Court Erroneously Afforded Preemptive Effect to the Federal Government's Regulatory Inaction.

To begin with, the Fifth Circuit's holding that the Coast Guard's decision *not* to commence rulemaking with respect to propeller guards has preemptive force directly conflicts with *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), which made clear that the mere absence of federal regulation with respect to a particular product has no preemptive effect whatsoever. In *Myrick*, this Court considered whether a claim that a manufacturer was negligent for failing to install antilock brakes in tractor-trailer trucks was preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1982), and by a federal motor vehicle safety regulation governing airbrake systems in buses, trucks, and trailers. 49 C.F.R. § 571.121 (S3) (1993) ("Standard 121").

As originally promulgated in 1974, Standard 121 required that all truck manufacturers install antilock brakes. This requirement was invalidated by the Ninth Circuit's decision in *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 640 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978), which held that, although the braking performance of some trucks was improved by antilock brakes, "critical problems began with mass p oduction of vehicles designed to meet the Standard." *Id.* at 641. Due to the unforeseen manufacturing difficulties encountered during mass production of antilock systems, the Ninth Circuit ordered the federal regulatory agency to suspend the antilock requirements of Standard 121. *Id.* at 643. In response, the agency added language to the regulation stating that the antilock brake provisions invalidated by the *Paccar*

ruling "are not applicable to trucks and trailers." 49 C.F.R. § 571.121(S3).

In *Myrick*, the truck manufacturers argued that Standard 121 preempted common law claims that their trucks were defective because they lacked antilock brakes. This Court disagreed, holding that there could be no express preemption because there was no federal standard in place regarding antilock brakes in trucks. *See* 514 U.S. at 286. In so holding, *Myrick* explicitly rejected the truck manufacturers' claim "that the absence of regulation itself constitutes regulation," especially where "there is no evidence that [the federal agency] decided that [the product] should be free from all state regulation . . .." *Id.* Regarding implied preemption, the Court ruled, first, that "it is not impossible for petitioners to comply with both federal and state law because there is simply no federal standard for a private party to comply with." *Id.* at 289. Frustration of federal objectives was also not an issue, in the Court's view, because the federal regulation "currently has nothing to say concerning [antilock brake] devices one way or another, and [the federal agency] has not ordered truck manufacturers to refrain from using [such] devices. A finding of liability against petitioners would undermine no federal objectives or purposes with respect to [antilock brake] devices, since none exist." *Id.* at 289-90.

Myrick is squarely at odds with the decision below. In finding federal preemption of petitioner's no-propeller-guard claim, the Fifth Circuit embraced the very proposition that was rejected in *Myrick*: that an agency's decision not to regulate has the same preemptive force as a decision to regulate. This ruling has the perverse effect of transforming a federal decision *not* to commence rulemaking regarding propeller guards on motor

boats into an affirmative decision to *ban* any common law claim seeking to require a manufacturer to pay damages for failing to include a specific propeller guard on a specific boat. Not only is this conclusion contrary to *Myrick,* but it flies in the face of numerous prior decisions of this Court holding that mere federal regulatory inaction, without more, does not imply an authoritative federal determination that the area is best left unregulated. *See, e.g., Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 496, 503-04 (1988) (federal inaction alone does not have preemptive effect); *Arkansas Elec. Co-Op v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (regulatory inaction only has preemptive force where Congress has made clear that its intention is "to fill a regulatory gap, not to perpetuate one.") (footnote omitted).

The lower court also ignored the fact that, as in *Myrick*, "there is no evidence that [the federal agency] decided that [the product at issue] should be free from all state regulation . . .." 514 U.S. at 286. As explained *supra* at 5-7, the Coast Guard's decision not to commence rulemaking regarding propeller guards stemmed from its "many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation." App. 17. Due to the lack of a "universally acceptable" solution, and the high statutory threshold of having to demonstrate that federal regulation would "avoid a substantial risk of personal injury to the public," 46 U.S.C. § 4302(c)(2), the Coast Guard declined to commence rulemaking to consider a nationwide standard for propeller guards. *Id.* The agency never stated, however, that there was *no* technology appropriate for use in *any* mode of boat operation; rather, the Coast Guard found that there was no technology appropriate for a national, *across-the-board* regulation applicable to *all* types of boats. Contrary to the Fifth

Circuit's apparent reasoning, this determination would be entirely consistent with a state's decision to allow some boat manufacturers to be held liable for failing to install a certain type of propeller guard on specific boats or on boats used for a particular purpose.

There is also no evidence that the Coast Guard intended to restrict the ability of victims of propeller accidents to seek compensation through the common law tort system. To the contrary, the record demonstrates that the Coast Guard was well aware of the on-going litigation regarding propeller guards (*see* App. 13), yet the agency said nothing to suggest that it intended to preempt such actions in the future. As the Texas Supreme Court found in *Moore, supra,* the Propeller Subcommittee report that was the basis for the Coast Guard's decision not to regulate propeller guards "mentions that manufacturers have been sued for not installing propeller guards, and recognizes that a federal requirement of propeller guards would establish a prima facie case of manufacturer liability in some states . . . Thus even if the Coast Guard made a policy determination, carrying preemptive weight, that propeller guards should not be regulated, its preemptive effect would not necessarily include common law." 889 S.W.2d at 252.

The absence of any preemptive intent on the part of the Coast Guard is dramatically underscored by the manner in which its decision was rendered. Under the Boat Safety Act, the Coast Guard is directed to "*prescribe regulations* . . . establishing minimum safety standards . . .." 46 U.S.C. § 4302(a)(1) (emphasis added). In keeping with this directive, Congress clearly intended that only properly promulgated regulations would exert preemptive force under the Act. In this case, however, there was no rulemaking proceeding of any sort,

let alone a federal regulation proclaiming the Coast Guard's intention to ban state regulation of propeller guards. Instead, the agency's decision not to commence rulemaking was the product of internal deliberations (as opposed to the notice-and-comment rulemaking procedures mandated by the Administrative Procedure Act, *see* 5 U.S.C. § 553 (1994)), and was embodied in an informal letter to the Chairperson of the Advisory Council setting forth the agency's decision not to regulate propeller guards. App. 16-17. This is hardly the type of "clear and manifest" expression of preemptive purpose that must be evident before preemption may be found based on regulatory inaction. *Isla Petroleum*, 485 U.S. at 503.

At bottom, the Coast Guard's decision not to commence rulemaking with regard to propeller guards is markedly similar to the fate of antilock brake regulation described in *Myrick*. In both cases, the absence of regulation was due to a determination that the current state of technology did not warrant a universal regulatory solution to a safety problem. In *Myrick*, that decision was made by the Ninth Circuit and then memorialized in the amendment to Standard 121 eliminating the antilock brake requirement for trucks and trailers; in this case, the decision not to commence rulemaking was made by the agency in the first instance. But the result in both instances was the same: an absence of any federal regulation mandating *or* prohibiting the use of the technology in question. *Myrick* makes clear that federal preemption does not exist under these circumstances.

The Fifth Circuit's decision, moreover, has implications far beyond the narrow issue of preemption under the Boat Safety Act. If the decision below is permitted to stand, it could massively broaden the scope of federal preemption far beyond

what Congress ever intended. Under the lower court's reasoning, *any* federal decision not to regulate could be deemed to have preemptive force, regardless of the reason for federal inaction and regardless of the extent to which Congress made clear its intent *not* to intrude on States' regulatory power and/or strip individuals of their common law remedies. Not only would this constitute a grievous blow against the traditional rights of victims to seek redress for injuries caused by dangerous products, but it would strip the States of their historic power to protect the health and welfare of their citizens. Review is warranted to prevent this deep encroachment on the rights of the States to protect their citizens and of citizens to use the common law to protect themselves – rights that neither Congress nor the Coast Guard ever expressed any intention to restrict.

B. The Lower Court Erroneously Disregarded the Presumption Against Preemption.

Review is also warranted to correct the lower court's decision to abandon any presumption against preemption of common law claims in all cases in the "maritime" context – even those involving a small recreational boat in state waters. *See* App. 38 ("we conclude that, at least in the instant maritime context, where the federal interest and presence has traditionally been so significant and there is no presumption against preemption, implied preemption precludes Lady's actions against OMC.") This approach does violence to the rights of the States to provide compensation for their citizens and flies in the face of long-standing decisions of this Court recognizing a strong presumption against federal preemption in health and safety matters. *See generally Medtronic*, 518 U.S. at 485.

The Fifth Circuit's error stemmed from a misreading of this Court's recent decision in *Locke*, 529 U.S. 89, 120 S. Ct.1135 (2000), which involved state regulations of the operation and design of ocean-going oil tankers used in international commerce. *Locke* merely held that, in a case where "[t]he state laws in question bear upon national and international *maritime commerce*, . . . there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Id.* at 1148 (emphasis added). A presumption against preemption is inappropriate in such cases, this Court reasoned, given Congress' longstanding authority "to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations." *Id.* at 1143. The Court also expressed concern that regulations governing international ocean-going oil tankers implicated "the substantial foreign affairs interests of the Federal Government." *Id.* at 1142.

These concerns have no bearing here. First, this case is entirely unrelated to "interstate navigation," as the accident that harmed petitioner occurred on Mississippi waters. Second, this case has nothing to do with "maritime commerce," international or otherwise, as the Boat Safety Act merely involves federal regulation of *recreational* vessels, such as the speed boat that struck petitioner. *See* 46 U.S.C. § 4301. Finally, the United States' "foreign affairs interests" – so paramount in *Locke* that "the governments of 13 ocean-going nations expressed their concerns [about conflicting state regulations] through a diplomatic note" (120 S. Ct. at 1142) – are clearly not implicated here. The United States has no greater interest in maintaining presumptively exclusive authority over safety features on small recreational boats than it has in other areas,

such as medical devices, cigarettes, and myriad other spheres where the federal government has regulatory authority and yet the presumption against preemption has been applied by this Court with full force. *See, e.g., Medtronic*, 518 U.S. at 485 (medical devices); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (cigarettes).

At the same time, *Locke* reaffirmed that the "beginning assumption" against preemption continues to apply in cases involving the "historic police powers of the States." 120 S. Ct. at 1147 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Numerous prior decisions of this Court have made clear that such powers may be exercised concurrently with the federal government's jurisdiction over maritime matters, *see, e.g., Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Kelly v. State of Washington*, 302 U.S. 1, 10 (1937), and that, absent express Congressional intent to preempt the entire field of state law, preemption only lies where the conflict between state and federal law is "so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" *Kelly*, 302 U.S. at 10 (citations omitted). *See also Askew*, 411 U.S. at 341; *Huron*, 362 U.S. at 444. Nothing in *Locke* suggests that these cases are no longer good law, or that the presumption against preemption no longer applies in cases – such as this one – that involve the historic police powers of the states to compensate accident victims through the tort system. *See, e.g., Medtronic*, 518 U.S. at 488. Review is warranted to correct the Fifth Circuit's unprecedented holding to the contrary.

C. The Lower Court Erroneously Disregarded the United States' Own Interpretation of the Preemptive Effect of the Coast Guard's Regulatory Inaction.

Finally, review is warranted because the Fifth Circuit improperly disregarded this Court's repeated teachings that the views of the federal government are entitled to deference when determining the preemptive effect of an agency's regulatory decisions. As this Court held in *Medtronic*, the United States' interpretation of the scope of preemption is entitled to "substantial weight." 518 U.S. at 496 (majority opinion); *id.* at 505-07 (Breyer, J., concurring). *See also Geier v. Honda*, 529 U.S. 1913, 120 S. Ct. 1913, 1928 (1999) (federal government's interpretation of preemptive scope of agency regulations is entitled to "special weight"); *Hillsborough County*, 471 U.S. at 714-15 ("[t]he [federal government's] statement is dispositive on the question of implicit intent to pre-empt unless either the agency's position is inconsistent with clearly expressed congressional intent, . . . or subsequent developments reveal a change in that position") (citations omitted). Deference to the federal government's understanding of the Boat Safety Act is particularly appropriate where, as here, the United States is *ceding* authority to the states, not trying to claim power for itself. The concern behind the preemption doctrine – protection of federal interests from inconsistent state or local activity – is not implicated where the United States itself does not object to – and indeed welcomes – state participation. *See Hillsborough County*, 471 U.S. at 714-15.

The Fifth Circuit paid lip service to these principles, but then substituted its judgment for that of the United States in holding that petitioner's common law claims are impliedly

preempted by federal law. Such an approach was warranted, in the lower court's view, because the United States had not entered an appearance before it – even though the federal government's brief in *Lewis* was made part of the record in this proceeding and even though the Fifth Circuit itself recognized the implied preemption question as a "close and difficult issue." App. 6. Review is warranted to ensure that the lower courts are not left free to disregard the federal government's own view on the preemptive scope of agency decisions.

CONCLUSION

This petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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Date: December 22, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60382

STEVEN G. LADY,

Plaintiff-Appellant,

versus

NEAL GLASER MARINE, INC; ET AL,

Defendants,

OUTBOARD MARINE CORPORATION,
Doing Business As OMC, INC.,
doing business as OMCC,
doing business as CHRIS CRAFT,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

Before: KING, Chief Judge, GARWOOD and DeMOSS, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiff-appellant Steven G. Lady (Lady) filed this suit in Mississippi state court against defendant-appellee Outboard Marine Corporation (OMC), seeking recovery for

losses he sustained in a boating accident. OMC removed the case to federal court on the basis of diversity jurisdiction. Following removal, OMC filed a motion for summary judgment, arguing that the Federal Boat Safety Act, 46 U.S.C. § 4301-4311 (FBSA), and Coast Guard regulatory action preempted Lady's state-law tort claims. By the consent of both parties, the action was referred to a Magistrate Judge for disposition. The Magistrate Judge granted OMC's motion for summary judgment. *Lady v. Outboard Marine Corp.*, 66 F. Supp.2d 818 (S.D. Miss. 1999). Lady now appeals. We affirm.

Facts and Proceedings Below

On May 7, 1995, Lady was riding a personal water craft, commonly known as a "jet ski," in Bayou La Croix, in Hancock County, Mississippi. Richard Rychetsky (Rychetsky), one of Lady's friends, was operating a motor boat to the rear portside of Lady's vessel. The two vessels were traveling at approximately thirty to thirty-five miles per hour within twenty feet of one another when Rychetsky blew his boat's horn. Lady reacted to the horn by making a hard left turn, placing his jet ski directly into the path of Rychetsky's boat. The vessels collided, causing Lady to be thrown off of his jet ski and under Rychetsky's boat. While in the water, Lady came into contact with the boat's moving propeller, resulting in severe injuries to Lady including lacerations to his head, the loss of one leg, and injury to the other.

On February 18, 1998, Lady filed this action in Mississippi state court against OMC, the manufacturer of Rychetsky's boat, and Neal Glaser Marine, Inc., the distributor of the boat, seeking recovery under Mississippi tort law for the injuries and losses he sustained as a result of

the May 7, 1995 boating accident on Bayou La Croix.[1] Lady alleged that OMC and Neal Glaser Marine were liable under Mississippi law for negligence, breach of warranty, gross negligence, and design defect for failing to equip Rychetsky's boat with a propeller guard.[2] On April 7, 1998, OMC removed the action to federal court on the basis of diversity jurisdiction. Lady later voluntarily dismissed his claims against Neal Glaser Marine.

Following removal, the case was placed on inactive status, pending the outcome of *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. granted*, 118 S.Ct. 439 (1998), in which the Supreme Court granted certiorari to consider the preemptive effect of the FBSA and Coast Guard regulations on an action similar to Lady's. After the Supreme Court heard oral argument in *Lewis* but before the Court issued a decision, the parties in *Lewis* settled and the Court dismissed the petition for certiorari. *See Lewis v. Brunswick Corp.*, 118 S.Ct. 1793 (1998). Following the Supreme Court's dismissal, Lady's action was removed from inactive status. On September 9, 1998, OMC moved for summary judgment, arguing that federal law preempted Lady's claims against OMC-the same issue before the Court in *Lewis*. One month later, Lady and OMC consented to a Magistrate Judge's conducting all proceedings in the action, including the entry of final judgment. After a hearing on OMC's motion for summary judgment, the Magistrate Judge granted the motion, concluding that the FBSA and Coast Guard regulatory

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[1] In a separate action, Lady settled his claims against Rychetsky.

[2] Lady's pleadings also alleged that the boat's throttle was defective; however, Lady later voluntarily dismissed this claim.

decisions preempted Lady's claims. Lady timely appealed.

Discussion

We review a judgment rendered by a Magistrate Judge[3] just as we would a judgment rendered by a district court. *See Madison v. Parker*, 104 F.3d 765, 767 (5th Cir. 1997). We review a grant of summary judgment applying the same standard as the court below was required to apply. *See Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 725 (5th Cir. 1995). Summary judgment must be affirmed when the nonmoving party, in this case, Lady, has failed to demonstrate that a material issue of fact is present. *See Madison*, 104 F.3d at 767. Summary judgment evidence is viewed in the light most favorable to the nonmovant, and questions of law are reviewed de novo. *See id.* The Magistrate Judge's ruling that federal law preempts Lady's claims is a legal determination that this Court reviews *de novo*. *See Baker v. Farmers Elec. Coop., Inc.*, 34 F.3d 274, 278 (5th Cir. 1994). We may affirm the summary judgment on any basis raised below and supported by the record. *See Davis v. Scott*, 157 F.3d 1003, 1005 (5th Cir. 1998); *Davis v. Liberty Mut. Ins. Co.*, 525 F.2d 1204, 1207 (5th Cir. 1976); *see also* 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2716, at 290 (3d ed. 1998).

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[3] OMC and Lady executed written consent to proceed before the Magistrate Judge, pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. In accordance with 28 U.S.C. § 636(c)(3), this Court is the appropriate forum for appellate review of the final judgment entered by the Magistrate Judge. *See Oliver v. Collins*, 904 F.2d 278, 279-80 (5th Cir. 1990).

I Preemption by the FBSA and Coast Guard Regulation

Federal law generally preempts state law under the Supremacy Clause whenever (1) Congress has expressly preempted state action, (2) Congress has installed a sufficiently comprehensive regulatory scheme in the area, thus removing the entire field from state realm, or (3) state action would directly conflict with the force or purpose of federal law. *See Cipollone v. Liggett Group*, 112 S.Ct. 2608, 2617 (1992); *English v. General Elec. Co.*, 110 S.Ct. 2270, 2275 (1990); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 n.1 (5th Cir. 1995) (*en banc*). As neither party suggests that the second type of preemption-field preemption-applies, we need only address express and implied conflict preemption.

Whether federal law preempts Lady's state common-law tort claims is an issue of first impression in this Court. Several other courts, both state and federal, have considered the issue. However, they have not reached a uniform conclusion. *See generally* Amy P. Chiang, Note, The Federal Boat Safety Act of 1971 and Propeller Strike Injuries: An Unexpected Exercise in Federal Preemption, 68 Fordham L. Rev. 487 (1999). Nine courts have held that express preemption applies. *See Carstensen v. Brunswick Corp.*, 49 F.3d 430, 431-32 (8th Cir. 1995); *Moss v. Outboard Marine Corp.*, 915 F. Supp. 183, 186 (E.D. Cal. 1996); *Davis v. Brunswick Corp.*, 854 F. Supp. 1574, 1580 (N.D. Ga. 1994); *Shield v. Bayliner Marine Corp.*, 822 F. Supp. 81, 83 (D. Conn. 1993); *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579, 1581 (M.D. Ga. 1991); *Mowrey v. Mercury Marine, Div. of Brunswick Corp.*, 773 F. Supp. 1012, 1016-17 (N.D. Ohio 1991); *Ryan v. Brunswick Corp.*, 557 N.W.2d 541, 548-49 (Mich. 1997); *Sprietsma v. Mercury Marine*, 729 N.E.2d 45, 52-53 (Ill. App. Ct. 2000); *Farner v. Brunswick Corp.*,

607 N.E.2d 562, 567-68 (Ill. App. Ct. 1993). Three courts have found implied preemption. *See Lewis*, 107 F.3d at 1505-06; *Davis*, 854 F. Supp. at 1581-82; *Shields*, 776 F. Supp. at 1582. Two courts have concluded that federal law does not preempt state law in this context. *See Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246, 250-51 (Tex.), *cert. denied sub. nom.*, 115 S.Ct. 664 (1994); *Ard v. Jensen*, 996 S.W.2d 594, 599-600 (Mo. Ct. App. 1999).

Lady argues that the Magistrate Judge erred in ruling that federal law preempts his Mississippi common-law tort claims against OMC. He contends that, despite the FBSA's express preemption clause, contained in 46 U.S.C. § 4306, and the Coast Guard's regulatory decisions, his action against OMC is not precluded because preemption under section 4306 does not extend to his common-law tort claims and because the FBSA's savings clause, 46 U.S.C. § 4311(g), preserves his action. OMC responds that section 4306 and the Coast Guard's regulatory decisions both expressly and impliedly preempt Lady's common-law tort claims, because subjecting OMC to a damage award would result in varying state requirements for recreational vessels, in direct contravention to Congress's intent to establish uniform requirements for recreational vessels. We now weigh in on this close and difficult issue and conclude that, although the FBSA and the Coast Guard's regulatory decisions do not expressly preempt Lady's tort claims, implied conflict preemption does preclude his action against OMC, because a state rule requiring propeller guards on recreational vessels would frustrate the Coast Guard's decision that recreational boats should not be required to be equipped with propeller guards.

A The FBSA and Coast Guard Regulatory Decisions

Congress enacted the FBSA in 1971, in part, "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating-presently the Secretary of Transportation." S. REP. No. 92-248 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1333. A significant increase in the number of recreational boaters in the United States and in the number of boating "accidents, deaths and injuries," *id.* at 1334, required "a coordinated national boating safety program." *Id.* at 1335. To implement this goal, the FBSA authorizes the Secretary of Transportation (the Secretary) to prescribe regulations establishing minimum safety standards for recreational boats. *See* 46 U.S.C. § 4302[4].

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[4] 46 U.S.C. § 4302 provides:

"(a) The Secretary may prescribe regulations-

(1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests to measure conformance with those standards, with each standard-

(A) meeting the need for recreational vessel safety; and

(B) being stated, insofar as practicable, in terms of performance;

(2) requiring the installation, carrying, or use of associated equipment (including fuel systems, ventilation systems, electrical systems, sound-producing devices,

(continued...)

[4] (...continued)

firefighting equipment, lifesaving devices, signaling devices, ground tackle, life- and grab-rails, and navigational equipment) on recreational vessels and classes of recreational vessels subject to this chapter, and prohibiting the installation, carrying, or use of associated equipment that does not conform with safety standards established under this section; and

(3) requiring or permitting the display of seals, labels, plates, insignia, or other devices for certifying or evidencing compliance with safety regulations and standards of the United States Government for recreational vessels and associated equipment.

(b) Each regulation prescribed under this section shall specify an effective date that is not earlier than 180 days from the date the regulation was published, unless the Secretary finds that there exists a recreational vessel safety hazard so critical as to require an earlier effective date. However, this period may not be more than 24 months for cases involving, in the discretion of the Secretary, major product design, retooling, or major changes in the manufacturing process.

(c) In prescribing regulations under this section, the Secretary shall, among other things-

(1) consider the need for and the extent to which the regulations will contribute to recreational vessel safety;

(2) consider relevant available recreational vessel safety standards, statistics, and data, including public and private research, development, testing, and evaluation;

(3) not compel substantial alteration of a recreational vessel or item of associated equipment that is in existence, or the construction or manufacture of which is begun before the effective date of the regulation, but

(continued...)

The Secretary has the option to delegate regulatory functions to a designated agency that then operates under the Secretary's supervision. *See* 46 U.S.C. § 4303(a)[5]. The Secretary exercised that option and delegated to the Commandant of the United States Coast Guard the duty of "[c]arry[ing] out the

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[4] (...continued)

subject to that limitation may require compliance or performance, to avoid a substantial risk of personal injury to the public, that the Secretary considers appropriate in relation to the degree of hazard that the compliance will correct; and

(4) consult with the National Boating Safety Advisory Council established under section 13110 of this title about the considerations referred to in clauses (1)-(3) of this subsection.

(d) Section 8903 of this title does not apply to a vessel being operated for bona fide dealer demonstrations provided without fee to business invitees. However, if on the basis of substantial evidence, the Secretary decides under this section that requiring vessels so operated to be under the control of licensed individuals is necessary for boating safety, then the Secretary may prescribe regulations requiring the licensing of individuals controlling these vessels in the same manner as provided in chapter 89 of this title for individuals in control of vessels carrying passengers for hire."

[5] 46 U.S.C. § 4303(a) states:

"Subject to regulations, supervision, and reviews that the Secretary may prescribe, the Secretary may delegate to a person, private or public agency, or organization, or to an office or employee under the supervision of that person or agency, any work, business, or function related to the testing, inspection and examination necessary for compliance enforcement and for the development of data to enable the Secretary to prescribe regulations under section 4302 of this title."

functions vested in the Secretary by the . . . Federal Boat Safety Act of 1971 . . .." 49 C.F.R. § 1.46(n)(1).

Immediately after the FBSA took effect, the Secretary began implementing a federal scheme of recreational boat safety regulations. In the initial period of transition from a primarily state law regime to a federal one, the Secretary, pursuant to 46 U.S.C. § 4305 [6], exempted all state boat safety laws "in effect on the effective date of the [FBSA]" from preemption under 46 U.S.C. § 4306. 36 Fed. Reg. 15764-65 (1971). Approximately one year later, the Coast Guard issued a set of federal regulations governing recreational boat design and performance. *See* 37 Fed. Reg. 15776-85 (1972). These regulations cover a broad spectrum, including personal flotation devices, flotation requirements, and ventilation, fuel, and electrical systems. *See generally* 33 C.F.R., subch. S. Thereafter, the Coast Guard replaced the blanket exemption from preemption of state boat safety law with a more limited one not at issue in this appeal. *See* 38 Fed. Reg. 6914-15 (1973).

Before promulgating a regulation, the Coast Guard is required to consult with the National Boating Safety Advisory Council (the Advisory Council)[7] on the need for regulation.

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[6] 46 U.S.C. § 4305 provides that "[i]f the Secretary considers that recreational vessel safety will not be adversely affected, the Secretary may issue an exemption from this chapter or a regulation prescribed under this chapter."

[7] The Advisory Council is a twenty-one member council, consisting of three groups of seven members. Each member of the council is appointed by the Secretary and is considered to have "particular expertise, knowledge, and experience in recreational boating safety." 46 U.S.C. § (continued...)

See 46 U.S.C. § 4302(c)(4). In 1988, the Coast Guard directed the Advisory Council to examine the feasibility and potential safety advantages and disadvantages of propeller guards on recreational boats and to consider whether requirements mandating propeller guards in the design and manufacture of recreational boats were appropriate. The Advisory Council then appointed a Propeller Guard Subcommittee (the Subcommittee) "to consider, review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers." National Boating Safety Advisory Board, Report of the Propeller Guard Subcommittee 1 (1989). The Advisory Council also asked the Subcommittee to consider, *inter alia*, whether "the Coast Guard [should] move towards a federal requirement for some form of propeller guard." *Id.* at app. A.[8]

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[7] (...continued)
13110(a). Section 13110(b) specifies the composition of the Advisory Council as follows:

"(b)(1) The membership of the Council shall consist of-

(A) 7 representatives of State officials responsible for State boating safety programs;

(B) 7 representatives of recreational vessel manufacturers and associated equipment manufacturers; and

(C) 7 representatives of national recreational boating organizations and from the general public, at least 5 of who shall be representatives of national recreational boating organizations." 46 U.S.C. § 13110(b).

[8] The Advisory Council's charge to the Subcommittee reads in full:

"* Review the available data on the prevention of propeller-strike
(continued...)

[8] (...continued)
accidents and the Coast Guard study of various methods of shrouding propellers to prevent contact with a person in the water.

* Assess the arguments for and against some form of mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public.

* Among points to be considered:

a. what is the incidence of such accidents?

b. is there a trend toward more or fewer such accidents?

c. what are the possible solutions and their advantages/disadvantages?

d. how is this problem being addressed in other nations?

e. what would be the direct costs and indirect costs (fuel economy, maintenance, etc.) of mechanical solutions?

f. can the risks be addressed by education?

g. should the Coast Guard move towards a federal requirement for some form of propeller guard?

h. assess the potential for propeller equipped with each of several propeller guard designs to cause injury. How much has the propeller guard reduced the injury potential compared to the injury potential of the same propeller operating in an unguarded manner?

(continued...)

Over a one-year period, the Subcommittee reviewed material provided by the Coast Guard and held hearings on three occasions, receiving information from a variety of individuals and groups interested in the topic of propeller guards. *See id.* at 1-3. One of the issues on which the Subcommittee received information was propeller guard litigation, and the Subcommittee devoted a section of its report to the topic. *See id.* at 4-6. The report details the legal theories of liability asserted against boat manufacturers by propeller strike victims, including the failure to equip boats with propeller guards, and the defenses raised by the manufacturers. *See id.* at 4-5. In this section, the Subcommittee notes that, at the time of the hearings, the advocates for propeller guards were "petition[ing] federal and state legislators and regulators to mandate propeller guards." *Id.* at 5. The Subcommittee's report further states that "[s]uch [a] mandate would necessarily be predicated on the feasibility of guards and establish prima facie manufacturer liability in having failed to provide them." *Id.* Therefore, the Subcommittee considered feasibility as an important issue. *See id.* Manufacturers, however, remained "opposed to mandatory propeller guards." *Id.* at 6.

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[8] (...continued)

i. should only new boats and motors be equipped with propeller guards, or should all boats eventually be equipped with a guard?

j. what is the practical boat length limit beyond which propeller guards would not be required? [A]re there other parameters which would dictate upper limits for guard installation?" *Id.*

The report later addresses the technical issues posed by propeller guards.[9] *See id.* at 12-19. The Subcommittee found that, while propeller guards were "feasible at idling and very low speeds," *id.* at 20, they adversely affected boat operation at speeds greater than ten miles per hour, "requir[ing] greatly increased power and fuel consumption to regain the lost speed." *Id.* at 21.[10] In addition, the

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[9] The report notes that, although numerous variations of propeller guards have been developed, they essentially take one of three configurations: (1) a ring band guard; (2) a mask guard; and (3) the Kort nozzle. *See id.* at 12-13. A ring band guard consists of a shell "secured to the submerged portion of an outboard motor or stern drive unit and within which the propeller revolves." *Id.* at 12. A mask guard involves "surrounding the propeller like a fan cage or catcher's mask, constructed of wire mesh, bars or wires." *Id.* at 13. A Kort nozzle, used mainly on tug boats and large vessels, shrouds the propeller in a tunnel or tube and with the installation of vanes can direct the flow of water and prevent the entry of body parts. *See id.* at 13, 15. The Subcommittee examined ring band and mask guards, but not nozzle guards, as none suitable for recreational vessels was brought to the attention of the Subcommittee. *See id.* at 15. Moreover, "[n]o guard device suitable for inboard engine drive propellers on displacement or planing motor boats, or on auxiliary sail boats was presented." *Id.* A concern raised with regard to installing the ring band and mask guards was an increase in "the total area of a possible underwater impact." *Id.* at 13.

[10] The Subcommittee's report also states that:

> "[B]oats and motors should be designed to incorporate technologically feasible safety features to avoid or minimize the consequences of inexperienced or negligent operation, without at the same time (a) creating some other hazard, (b) materially interfering with normal operations, or (c) being at economic costs disproportionate to the particular risk.
>
> Proponents [of propeller guards] assert that propeller guard

(continued...)

Subcommittee determined that propeller guards would not necessarily increase overall boating safety, because they would increase the chance of contact between a blunt object (the propeller guard) and a person in the water, thereby substituting a decreased chance of a propeller strike injury for an increase in the likelihood of a blunt trauma injury. *See id.* at 19-21.[11] Therefore, the Subcommittee

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[10] (...continued)
technology and/or availability meets the foregoing criteria and that guards should be mandated. The Subcommittee does not agree . . .." *Id.* at 20.

[11] The Subcommittee noted that:

"Injuries/fatalities caused by underwater impacts result from a person coming into contact with the propeller or any part of the propulsion unit (i.e., lower unit, skeg, torpedo, anti-ventilation plate, etc.) and even the boat itself. Currently reported accidents make it obvious that all such components are involved in the total picture, and that the propeller itself is the sole factor in only a minority of impacts. The development and use of devices such as 'propeller guards' can, therefore, be counter-productive and create new hazards of equal or greater consequence.

[] Operator error is clearly a significant factor in the vast majority of underwater impacts which result in injuries/fatalities. Mandatory equipment requirements could be expected to have only a negligible impact on this problem. The most rational approach to the problem is to educate boaters, especially operators. They must be made to understand the abilities and limitations of their equipment. They must be aware of and understand the hazards their boat can cause to people in the water. Above all, they must be made to understand the consequences of careless or negligent operation of their watercraft, and how they, as boat operators, can act to prevent accidents.

[] Although the controversy which currently surrounds the issue of propeller guarding is, by its very nature, highly emotional and has (continued...)

recommended unanimously that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." *Id.* at 24.

The Subcommittee's Chairman, Captain James E. Getz, presented the report to the entire Advisory Council, which unanimously "accept[ed] the report, adopt[ed] the recommendations of the subcommittee, and discharge[d] the subcommittee as having completed its task." Minutes of the 44th Meeting of the National Boating Advisory Council 19 (Nov. 6-7, 1989). The Advisory Council then forwarded the report and recommendations to the Coast Guard. On February 1, 1990, the Coast Guard informed the Advisory Council that it had adopted each of the Advisory Council's recommendations. *See* Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services, to A. Newell Garden, Chairman, National Boating Safety Advisory Council (Feb. 1, 1990). The letter explains the Coast Guard's position on propeller guards as follows:

> "The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about

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[11] (...continued)
attracted a great deal of publicity, there are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public must not be misled into thinking there is a 'safe' device which would eliminate or significantly reduce such injuries or fatalities." *Id.* at 23-24.

whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

The Coast Guard will continue to collect and analyze data for changes and trends; and will promote increase/improved reporting as addressed in recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guarding devices or other information on the state of the art." *Id.* at 1.

Accordingly, the Coast Guard decided not to implement regulations requiring propeller guards on recreational boats.[12] Neither, however, has the Coast Guard

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[12] The Coast Guard has continued to study various proposals to prevent propeller-related injuries. In 1995, the Coast Guard issued an Advance Notice of Proposed Rulemaking (ANPRM) requesting comment on "the public's present feelings about the use of propeller guards . . . on these vessels." 60 Fed. Reg. 25191 (1995). In 1996, the Coast Guard issued an ANPRM "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 13123 (1996). And, in 1997, the Coast Guard requested "comments on the effectiveness of specific devices and interventions which have been suggested for reducing the number of recreational boating accidents involving rented power boats in which individuals are injured by the propeller." 62 Fed. Reg. 22991 (1997). Because this request received so few responses, the Coast Guard extended the period for comments. *See* 62 Fed. Reg. 44507 (1997). To date, the rulemaking remains open, and the Coast Guard is still considering what action, if any, to take regarding propeller

(continued...)

forbidden the installation of propeller guards. It is against this backdrop of Coast Guard decision making that we consider Lady's claims against OMC.

B Presumptions Regarding Preemption

At the outset, the parties dispute the here important question of whether our analysis should begin with a presumption that federal law does not preempt Lady's common-law tort claims against OMC. Lady contends that, in areas traditionally regulated by states through their police powers, a presumption that federal law does not supercede such powers arises. Lady concludes that, because his claims primarily concern safety and health, the presumption against preemption applies in this case. Conversely, OMC asserts that Lady's action also bears upon general maritime law, which is primarily of federal concern, and therefore a presumption against preemption is not warranted in this context. To be sure, Lady's tort action touches on safety and health-"matters that historically have been areas of state jurisdiction." *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1023 (5th Cir. 1994) (citing *Hillsborough County v. Automated Medical Labs.*, Inc., 105 S.Ct. 2371, 2376 (1985)); *see Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240, 2250 (1996). However, in *United States v. Locke*, 120 S.Ct. 1135 (2000), the Supreme Court made clear that "an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *Id.* at 1147 (citations omitted). *Locke* considered whether federal law preempted a series of regulations enacted by the State of

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[12] (...continued)
guards. *See* 64 Fed. Reg. 21566 (1999).

Washington in response to the Exxon Valdez oil spill; these regulations addressed, inter alia, oil tanker operations and design, as well as crew training and qualifications, and were established "to provide 'the best achievable protection . . . from damages caused by the discharge of oil.'" *Id.* at 1142 (quoting WASH. REV. CODE § 88.46.040(3) (1994)). Although these tanker standards were promulgated to preserve the health and safety of Washington's population and property, the Court nevertheless concluded that, because Washington's regulations "b[ore] upon national and international maritime commerce, . . . in this area there [wa]s no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Id.* at 1148.

Similarly, Lady's action, which alleges that OMC designed a defective boat by failing to include a propeller guard, relates not only to health and safety, but also to maritime activity-an area traditionally within the purview of federal regulation. *See Southern Pac. Co. v. Jensen*, 37 S.Ct. 524, 528 (1917) ("Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.") (citations omitted); *see also Locke*, 120 S.Ct. at 1148 ("Congress has legislated in the [area of maritime commerce] from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme."); *Kelly v. Washington*, 58 S.Ct. 87, 89 (1937) ("The federal acts and regulations with respect to vessels on the navigable waters of the United States are elaborate."); *Mallard Bay Drilling, Inc. v. Herman*, 212 F.3d 898, 900-02 (5th Cir. 2000) (holding that the Coast Guard had sole jurisdiction, to the exclusion of OSHA, over the working conditions of seamen on barges in a navigable waterway within a state's territorial waters); *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 316-18 (5th Cir.

1987), *rev'd on other grounds*, 108 S.Ct. 1684 (1988); *cf. Consolidated Cigar Corp. v. Reilly*, __ F.3d __, 2000 WL 960526, at * 3 (1st Cir. July 17, 2000) (deciding that a presumption against preemption does arise when considering state regulations on the sale, promotion, and labeling of tobacco products, by contrasting federal involvement in tobacco products with that in maritime activity). Admittedly, Lady's claims do not involve a tanker engaged in maritime commerce. However, the Court in *Foremost Insurance Co. v. Richardson*, 102 S.Ct. 2654 (1982), held that a collision between two pleasure craft on navigable waters had a sufficient nexus to traditional maritime activity to fall within the admiralty jurisdiction of the federal courts.[13] *See id.* at 2658-59. Accordingly, any distinction between recreational vessels and tankers is of little significance, as the national interest in vessels operating on navigable waters of the United States encompasses both. *See id.* at 2659.

The FBSA and the regulations prescribed pursuant to the FBSA "appl[y] to a recreational vehicle and associated equipment carried in the vessel on waters subject to the jurisdiction of the United States . . . and, for a vessel owned in the United States, on the high seas." 46 U.S.C. § 4301(a); *see* S. Rep. No. 92-248 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1338 ("General jurisdictional applicability [of the FBSA] is to vessels within the historic federal maritime jurisdiction-the navigable waters of the United States, certain internal waters which are in the exclusive or concurrent jurisdiction of the United States, and extraterritorial

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[13] "The judicial Power [of the United States] shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . .." U.S. Const. art. III, § 2.

applicability to vessels owned in the United States."). Lady does not argue that Rychetsky's boat was not a "recreational vehicle" or a vessel, nor does Lady contend that the waterway where the boating accident occurred, Bayou La Croix, is not a navigable water "subject to the jurisdiction of the United States." 46 U.S.C. § 4301(a). Therefore, the design and manufacture of Rychetsky's boat is subject to the FBSA and the regulatory decisions promulgated under the FBSA. Because a state common-law rule requiring OMC to equip its boats with propeller guards implicates federal concerns at least as much state concerns, we cannot say that the state's interests predominate. Therefore, in this area where the proposed state rule at issue bears upon an area traditionally regulated by the federal government, a presumption against preemption does not guide our analysis of whether federal law precludes Lady's common-law tort claims against OMC. *See Locke*, 120 S.Ct. at 1147-48; *see also CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp.2d 643, 648-49 (E.D. Mich. 2000) (holding, under *Locke*'s principles, that, given Congress's well-established power to regulate the railroad industry, a presumption against preemption does not arise in deciding whether a state statute was preempted by the Federal Railway Safety Act).

C Express Preemption

We now address whether the FBSA and the Coast Guard's regulations expressly preempt Lady's state common-law tort action against OMC. OMC contends that Lady's claims fall within the reach of the FBSA's express preemption clause, which provides:

"Unless permitted by the Secretary under

section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title." 46 U.S.C. § 4306.[14]

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[14] The legislative history explains the preemption clause as follows:

"This section [46 U.S.C. § 4306] provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements. At the same time, it was recognized that there may be serious hazards which are unique to a particular locale and which would justify variances at least with regard to the carriage or use of marine safety articles on boats. Therefore, the section does permit individual States to impose requirements with respect to carrying or using marine safety articles which go beyond the federal requirements when necessary to meet uniquely hazardous local conditions or circumstances. A right of disapproval, however, is reserved to the Secretary to insure that indiscriminate use of state authority does

(continued...)

In OMC's view, the Coast Guard's 1990 decision not to require propeller guards constitutes a "regulation prescribed under section 4302," which preempts state laws or regulations. OMC contends that Lady's action, if successful, would result in a state common-law regulation requiring propeller guards on recreational boats, which would not be identical to and would actually conflict with the Coast Guard's decision that propeller guards should not be required. Thus, OMC concludes that Lady's claims are preempted by section 4306.

Lady responds that the section 4306's phrase "law or regulation" does not include the common law, because section 4306 makes no mention of "common law," and thus refers only to positive enactments of law at the state or local level. Accordingly, Lady concludes that Congress's failure to specify "common law" in section 4306 evinces an intent not to preempt common-law claims such as his. Moreover, Lady contends that the FBSA's savings clause, 46 U.S.C. § 4311(g)[15], preserves his claims against OMC, despite the preemption clause and regulatory decisions concerning

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[14] (...continued)
not seriously impinge on the basic need for uniformity.

The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern." S. Rep. No. 92-248 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1341.

[15] 46 U.S.C. § 4311(g) states that "[c]ompliance with this chapter or standard, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law."

recreational vessels.

In determining the scope of preemption under section 4306, we focus on the purpose of Congress. *See Medtronic*, 116 S.Ct. at 2250 (citations omitted). Congressional intent is revealed primarily through the text of the preemption statute and the statutory framework surrounding it. *See id.* at 2250-51 (citation omitted); *see also CSX Transp., Inc. v. Easterwood*, 113 S.Ct. 1732, 1737 (1993) ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent."). "Also relevant, however, is the 'structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic*, 116 S.Ct. at 2251. By its terms, section 4306 preempts state laws or regulations that are not identical to regulations promulgated under the FBSA, unless exempted from by preemption by the Secretary under 46 U.S.C. § 4305 or directed to remedy uniquely local dangers (subject to the Secretary's disapproval). Because the FBSA does not define the section 4306's phrase "law or regulation", we now consider whether it includes state common-law tort claims.

Although section 4306 does not specifically enumerate "common law" as being preempted, the Supreme Court, in other contexts, has interpreted language similar to section 4306's to include state common-law tort actions. *See, e.g., Medtronic*, 116 S.Ct. at 2260 (considering the term "requirement" in the Medical Devices Act, 21 U.S.C. §

360k(a)) (Breyer, J., concurring in part and concurring in judgment); id. at 2263 (same) (O'Connor, J., joined by Rehnquist, C.J., and Scalia, and Thomas, JJ., concurring in part and dissenting in part) (same); *Morales v. Trans World Airlines, Inc.* 112 S.Ct. 2031, 2039 (1992) (concluding that a state common-law claim counts as "any law, rule, regulation, standard, or other provision having the force and effect of law" for purposes of the Airline Deregulation Act); *Cipollone*, 112 S.Ct. at 2620 (holding that "requirements or prohibitions . . . under State law," contained in the Public Health Cigarette Smoking Act of 1969, made no distinction between positive legal enactments and the common law) (plurality opinion); *id.* at 2634 (same) (Scalia, J., joined by Thomas, J., concurring in judgment in part and dissenting in part); *CSX Transp.*, 113 S.Ct. at 1737 (interpreting the phrase "state 'law, rule, regulation, order, or standard relating to railroad safety'") (quoting 45 U.S.C. § 434); *see also MacDonald*, 27 F.3d at 1025 ("The MacDonalds argue, however, that state common law judgments are not 'requirements': the liable party is not 'required' to change his label by a damage award, the argument goes, but may simply pay the judgment and leave the label as it is. We think this argument is sophistry."). This past term, the Court, in *Geier v. American Honda Motor Co., Inc.*, 120 S.Ct. 1913 (2000), considered whether the Motor Vehicle Safety Act's express preemption provision[16]

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[16] The provision at issue in *Geier* reads as follows:

"Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any

(continued...)

preempted a state tort action based on the failure to equip an automobile with a driver's side airbag. *See id.* at 1918. Although acknowledging that the term "requirement" included common-law tort actions in *Medtronic*, the Court stated that "[w]e need not determine the precise significance of the use of the word 'standard,' rather than 'requirement,' . . . for the [Motor Vehicle Safety] Act contains another provision, which resolves the disagreement." *Id.* This provision, a savings clause[17], "assumes that there are some significant number of common-law liability cases to save." *Id.* In order to give effect to the savings clause, the Court interpreted "standard" so as to exclude common-law tort actions. *See id.* Otherwise, under a "broad reading of the pre-emption clause little, if any, potential 'liability at common law' would remain[,] [a]nd few, if any, state tort actions would remain for the saving clause to save." *Id.*; *see United Airlines, Inc. v. Mesa Airlines, Inc.*, ___ F.3d ____, 2000 WL 898694, at *2 (7th Cir. July 5, 2000) ("A broad clause saving common-law remedies might overcome the understanding that judgments in tort suits should be treated like state laws and regulations to the extent that they have the same practical effect as laws and regulations . . ..") (citations omitted).

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[16] (...continued)
safety standard applicable to the same aspect of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d).

[17] The Motor Vehicle Safety Act's savings clause provides that "[c]ompliance with" a federal motor vehicle safety standard "does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k) (1988). Section 1397(k) is now codified with some changes at 49 U.S.C. § 30103(e).

Similar to the Motor Vehicle Safety Act, the FBSA also contains a savings clause, which provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g).[18] As indicated by *Geier*, the presence of the savings clause precludes a broad reading of the express preemption provision of section 4306. *See also Freytag v. Commissioner of Internal Revenue*, 111 S.Ct. 2631, 2638 (1991) ("Our cases consistently have expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'") (quoting *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 110 S.Ct. 2126, 2133 (1990)).[19] We accordingly are unable to conclude that section

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[18] The legislative history explains the savings clause as follows:

"This section is a Committee amendment and is intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. The purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for evidentiary value." S. Rep. No. 92-248 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1352.

[19] A recent decision of the Tenth Circuit, albeit concerning a different act's preemption and savings clauses, supports our conclusion that the FBSA's express preemption clause cannot be given such a broad reading. In *Choate v. Champion Home Building Co.*, ___ F.3d ___, 2000 WL 1022251 (10th Cir. July 25, 2000), the Tenth Circuit held that, pursuant to

(continued...)

4306 preempts more than positive enactments of law by a state or local legislature or administrative agency or official and extends to expressly preempt Lady's common-law tort action against OMC.

D Implied Preemption

Our conclusion that Lady's action is not expressly preempted does not "foreclose[] any possibility of implied pre-emption." *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483, 1488 (1995); *see Geier*, 120 S.Ct. at 1919 (stating that "the savings clause (like the express pre-emption provision) [of the National Traffic and Motor Vehicle Safety Act] does not bar the ordinary working of conflict pre-emption principles"); *Freightliner*, 115 S.Ct. at 1488 ("The fact that an express definition of the pre-emptive reach of a statute 'implies'-i.e., supports a reasonable inference-that Congress did not intend

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[19] (...continued)
the Supreme Court's teachings in *Geier*, the preemption clause of the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. § 5403(d), did not preempt a tort action against the manufacturer of a mobile home, in light of the Manufactured Housing Act's also containing a savings provision which stated that "[c]ompliance with any Federal manufactured home construction or safety standard issued under this chapter does not exempt any person from liability under common law," 42 U.S.C. § 5409(c). *See Choate*, 2000 WL 1022251, at *3-4 ("Given the nearly identical nature of the preemption and saving clause provisions in the National Traffic and Motor Vehicle Safety Act and the Manufactured Housing Act, we hold, in light of *Geier*, that Choate and Madewell's claim is not expressly preempted.") (footnote omitted). The Tenth Circuit then considered implied conflict preemption, concluding that, because the common-law tort action did not conflict with the federal standard requiring a hard-wired smoke detector in manufactured homes nor thwart a federal policy, implied preemption did not lie. *See id.* at *6-7.

to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption."). Implied conflict preemption "occurs when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purpose and objective of Congress." *Locke*, 120 S.Ct. at 1148 (internal quotations and citations omitted). As compliance with both a state common-law rule requiring a propeller guard and the Coast Guard's decision not to require propeller guards is not impossible, we address whether a common-law rule requiring a propeller guard would disrupt the results Congress sought to achieve with the enactment of the FBSA.

OMC argues that Congress enacted the FBSA to create a uniform system of requirements for recreational vessels. OMC maintains that the Coast Guard's decision not to require propeller guards amounts to a determination that such a requirement is not appropriate, thus leaving manufacturers with the flexibility to choose an appropriate response to the safety issues presented by boat propellers. OMC contends that to allow common-law claims to impose a rule requiring propeller guards would eviscerate the Coast Guard's decision that such a requirement should not be imposed and destroy the flexible approach adopted by the Coast Guard.

In response, Lady contends that the Coast Guard's decision neither to require nor forbid propeller guards does not create a rule subject to uniform application. Lady asserts that a common-law claim that may impose a rule of boat and equipment safety standards is permissible, as long as the Coast Guard has not promulgated a regulation that conflicts

with the common-law requirement. Accordingly, Lady argues, the Coast Guard's decision not to impose a safety standard on propellers leaves room for state common-law to impose a standard on the matter. In support of this position, Lady relies on *Freightliner*, in which the Court considered whether the absence of a federal standard on a safety matter implicitly preempted a state common-law action imposing such a standard.

In *Freightliner*, the Supreme Court considered whether common-law claims based on the failure to install anti-lock braking systems on tractor-trailers were expressly or impliedly preempted by the Motor Vehicle Safety Act. *See Freightliner*, 115 S.Ct. at 1486-87. The defendant manufacturers argued that such claims were preempted, because the relevant agency had indicated an intent to regulate braking matters by prescribing a regulation on the matter. *See id.* at 1486. This regulation was later struck down by a court of appeals, but the defendants in *Freightliner* maintained that it still had preemptive effect, because it demonstrated an intent to forbid state regulation of braking systems. *See id.* at 1487.

The Court rejected the manufacturers' argument. No federal standard on the stopping distances or vehicle stability for trucks or trailers had been prescribed, and the Court determined that the absence of regulation did not constitute regulation, because "there is no evidence that [the Secretary] decided that trucks and trailers should be free from all state regulation of stopping distances and vehicle stability." *Id.* at 1487. "[T]he lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes." *Id.* In the absence of federal action, the

Court concluded that under the Motor Vehicle Safety Act the "States remain free to 'establish, or to continue in effect,' their own safety standards concerning those 'aspects of performance.'" *Id.* (quoting 15 U.S.C. §§ 1392(d)). Therefore, the Court held that "[a] finding of liability [based on the failure to install anti-lock brakes] would undermine no federal objectives or purposes with respect to [anti-lock braking] devices, since none exist." *Id.* at 1488. Accordingly, implied conflict preemption did not apply. In contrast to *Freightliner* where "the lack of federal regulation did not result from an affirmative decision by agency officials to refrain from regulating," *id.* at 1487, the lack of a regulation mandating propeller guards on recreational boats came after the Coast Guard studied the matter and affirmatively determined that requiring propeller guards was substantively inappropriate. Therefore, *Freightliner*'s teachings do not preclude implied preemption in the present case.

In *Geier*, the Court again encountered the Motor Vehicle Safety Act-this time to decide whether a safety standard promulgated by the Secretary, FMVSS 208, preempted a common-law action based on the failure to install a driver's side airbag. FMVSS 208 gave vehicle manufacturers a choice as to whether or not to install airbags and pursued a gradual phase-in of airbag and passive restraint systems. *See Geier*, 120 S.Ct. at 1917, 1924; *see also id.* at 1922 (The Department of Transportation's "comments, which accompanied the promulgation of FMVSS 208, make clear that the standard deliberately provided the manufacturer with a range of choices among different passive restraint devices."). After concluding that the Motor Vehicle Safety Act did not expressly preempt Geier's claims, the Court addressed implied preemption. *See id.* at 1919-28. The Court

noted that the rule of state tort law Geier sought to impose by her lawsuit "would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors." *Id.* at 1925; see id. ("[Geier's lawsuit] would have required all manufacturers to have installed airbags in respect to the entire District-of-Columbia-related portion of their 1987 new car fleet, even though FMVSS 208 at that time required only that 10% of a manufacturer's nationwide fleet be equipped with any passive restraint device at all."). Therefore, the Court determined that Geier's tort claims "would have presented an obstacle to the variety and mix of devices that the federal regulation sought . . . [and] also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed." *Id.* Because the rule of law for which Geier pursued through her tort action "would have stood 'as an obstacle to the accomplishment and execution of' the[se] important means-related federal objectives . . ., it is pre-empted." *Id* (quoting *Hines v. Davidowitz*, 61 S.Ct. 399, 404 (1941)).

In *Geier*, the Court held that FMVSS 208 was to be given pre-emptive effect over conflicting state laws. *See id.* at 1928. OMC contends that we should apply this rule to preempt Lady's action. However, unlike the situation in Geier, OMC's contention does not rest upon a prescribed safety standard, but rather a decision not to prescribe a standard, in which the Coast Guard, after considering whether to require propeller guards, decided that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services, to A. Newell Garden, Chairman, National Boating Safety

Advisory Council (Feb. 1, 1990). An agency decision not to regulate does not always, or perhaps even usually, carry a preemptive effect. *See Freightliner*, 115 S.Ct. at 1488; *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 108 S.Ct. 1350, 1355 (1988). Yet, "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 103 S.Ct. 1905, 1912 (1983) (citations omitted). This is so where the "failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such a legislation." *Ray v. Atlantic Richfield Co.*, 98 S.Ct. 988, 1004-05 (1978) (quotations and citations omitted).

In *Ray*, the Court considered whether federal law preempted the State of Washington's enactment of a law "exclud[ing] from Puget Sound under any circumstances any tanker in excess of 125,000 DWT [or deadweight tons]." *Id.* at 1002. Because section 1222(b) of the Ports and Waterways Safety Act (PWSA) prohibited a state from imposing higher safety standards than those prescribed by the Secretary of Transportation under Title I of the PWSA, the Court held that Washington's size limitation for vessels in Puget Sound was unenforceable. *See id.* at 1003. The Court went further, stating that "even without § 1222(b), we would be reluctant to sustain the [Washington's] Tanker Law's absolute ban on tankers larger than 125,000 DWT." *Id.* at 1004. The Court found this to be appropriate in light of the Coast Guard's local navigation rule for the Rosario Strait. *See id.* at 1004; *see also id.* at 1007

("The Coast Guard's unwritten 'local navigation rule[]' . . . prohibits passage of more than one 70,000 DWT vessel through Rosario Strait at any given time . . .") (Marshall, J., dissenting, joined by Brennan and Rehnquist, JJ.). The Secretary of Transportation, through the Coast Guard, had issued "the Puget Sound Vessel Traffic System containing general rules, communication rules, vessel movement reporting requirements, a traffic separation scheme, special rules for ship movement in Rosario Strait, descriptions and geographic coordinates of the separation zones and traffic lanes, and a specification for precautionary areas and reporting points." *Id.* at 1001. The local navigation rule governing traffic in the Rosario Strait "prohibited the passage of more than one 70,000 DWT vessel through Rosario Strait in either direction at any given time . . . [and] [d]uring the periods of bad weather, [reduced] the size limitation . . . to approximately 40,000 DWT." *Id.* (internal quotations and citations omitted). Because of this prescription of a narrow limit on vessels in the Rosario Strait, the Secretary of Transportation's failure to promulgate a ban on the operations of oil tanker in excess of 125,000 DWT in Puget Sound constituted a decision that no such regulation is appropriate pursuant to the policy of the PWSA. *See id.* at 1004-05; *see also id.* at 1003 ("[I]t appears sufficiently clear that federal authorities have indeed dealt with the issue of size and have determined whether and in what circumstances tanker size is to limit navigation in Puget Sound. The [Washington] Tanker Law purports to impose a general ban on large tankers, but the Secretary's response has been a much more limited one."). In *Locke*, the Supreme Court defined the relevant inquiry in Ray "as whether the Coast Guard promulgated its own requirement on the subject or has decided that no such

requirement should be imposed at all." *Locke*, 120 S.Ct. at 1148 (citations omitted).[20] Although the issue is an extremely close one, we conclude that the Coast Guard's decision not to require propeller guards on recreational vessels takes on a similar character.

In refusing to require propeller guards, the Coast Guard stated as follows:

> "Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation." Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services, to A. Newell Garden, Chairman, National Boating Safety Advisory Council (Feb. 1, 1990).

After the Coast Guard studied the need for mandating propeller guards on recreational vessels, it decided that, in the absence of more information on propeller strike accidents,

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[20] The *Locke* Court reaffirmed the principles set forth in Ray, holding that the State of Washington's post-*Ray* regulations on the design and construction of tankers traversing Puget Sound remained subject to preemption by the comprehensive federal regulatory scheme governing oil tankers. *See id.* at 1148-50.

such a requirement was not warranted, choosing instead to leave manufacturers with the option of whether or not to attach a propeller guard and, if so, what type. A damage award in favor of Lady would effectively require boat manufacturers to install propeller guards, in direct contravention to the Coast Guard's policy against mandating such a device in favor of affording manufacturers flexibility in the matter. *See San Diego Building Trades Council v. Garmon*, 79 S.Ct. 773, 780 (1959) ("[State] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."); *MacDonald*, 27 F.3d at 1025 ("If plaintiffs could recover large damage awards because the herbicide was improperly labeled under state law, the undeniable practical effect would be that state law requires additional labeling standards not mandated by [federal law]."); *see also Lewis*, 107 F.3d at 1505; *Carstensen*, 49 F.3d at 432 (both holding that a product liability claim against a boat manufacturer, like Lady's, seeks to impose a propeller guard requirement). Accordingly, the rule of law sought to be imposed by Lady would present an obstacle to and frustrate the flexible approach towards propeller guards adopted by the Coast Guard. *See Geier*, 120 S.Ct. at 1925. Therefore, Lady's action is impliedly preempted by the Coast Guard's considered decision that, on the merits of the matter, imposing a requirement for propeller guards was substantively inappropriate. *See Locke*, 120 S.Ct. at 1148 (stating that regulations, in certain contexts, may "be given

pre-emptive effect over conflicting state laws").[21]

We do not hold that simply because the Coast Guard has not acted on a safety matter that state action is precluded. Rather, where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement, that decision takes on the character of a regulation and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's. For example, if Lady's state common-law tort action against OMC concerned a manufacturing or design issue never presented to or considered by the Coast Guard, implied preemption would not apply, because there would be no federal action to be contravened by a successful tort claim. Although this dichotomy in analyzing the preemption of state common-law claims under the FBSA and Coast Guard regulatory decisions will not necessarily lead to complete nation-wide uniformity in the rules governing the manufacturing and design of recreational vessels, the goal for uniformity, as indicated in the FBSA's preemption clause, 46 U.S.C. §4306, and the Coast Guard's regulations, must be balanced with Congress's willingness to accept some state action, as evinced in the

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[21] The preemptive effect of Coast Guard regulations is reinforced by the actions taken by the Coast Guard after the FBSA's enactment in 1971-specifically, granting a blanket exemption from preemption for then-existing state and local laws on recreational boats, *see* 36 Fed. Reg. 15764-65 (1971), and later replacing the blanket exemption with a more limited one, *see* 38 Fed. Reg. 6914-15 (1973).

FBSA's savings clause, 46 U.S.C. §4311(g).[22] Lady's claims, however, fall on the side of the dichotomy where the Coast Guard has studied a matter and affirmatively decided that imposing a requirement was substantively inappropriate.

Thus, we conclude that, at least in the instant maritime context where the federal interest and presence has traditionally been so significant and there is no presumption against preemption, implied preemption precludes Lady's action against OMC.[23]

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[22] We also conclude that product liability claims based on the defective design, manufacture, or installation of products that are already installed and not subject to Coast Guard regulation are also not preempted. *See Lewis*, 107 F.3d at 1504-05 (citations omitted).

[23] In arguing against preemption, Lady relies on the Solicitor General's position before the Supreme Court in Lewis. Appearing as *amicus curiae* for the United States, the Solicitor General urged the Court to reverse the Eleventh Circuit's judgment in *Lewis*. The Solicitor General maintained that the FBSA and the Coast Guard's decision not to require propeller guards neither expressly nor impliedly preempted state tort claims alleging that the manufacturer should have installed a propeller guard. In finding implied preemption in *Geier*, the Court "place[d] some weight upon [Department of Transportation]'s interpretation of FMVSS 208's objectives and its conclusions, as set forth in the Government's brief." *Geier*, 120 S.Ct. at 1926. In accepting the view presented by the Solicitor General, the Court noted that "[w]e have no reason to suspect that the Solicitor General's representation of [Department of Transportation]'s views reflects anything other than 'the agency's fair and considered judgment on the matter.'" *Id.* at 1927 (quoting *Auer v. Robbins*, 117 S.Ct. 905, 912 (1997)). The Solicitor General, however, has not appeared in this case; therefore, his views on the matter are not before us. Moreover, even if we were to consider the position taken by the Solicitor General in *Lewis*, the weight we would place on it

(continued...)

Conclusion

For the reasons stated, the judgement of the district court is

AFFIRMED.

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[23] (...continued)
would not be sufficient to overcome the reasons supporting the application of implied preemption.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STEVEN G. LADY	§	
	§	
	§	PLAINTIFF
	§	
v.	§	1:98cv168RG
	§	
OUTBOARD MARINE	§	
CORPORATION, d/b/a OMC	§	
INC., d/b/a OMCC, d/b/a	§	
CHRIS CRAFT AND DOES I-X	§	DEFENDANTS

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BEFORE THIS COURT is the Motion of the Defendants, Outboard Marine Corporation and Recreational Boat Group Limited Partnership (hereinafter referred to as either "Defendants" or "OMC"), for Summary Judgment [13-1]. In their Motion, Defendants contend that Plaintiff's claims are preempted by provisions of the Federal Boat Safety Act of 1971 ("FBSA"). Plaintiff argues that his common law claims are preserved by the FBSA's savings clause. After consideration of the Motion, briefs and arguments of counsel and the relevant legal authority, it is the opinion of the Court

that Plaintiff's common law product is preempted by the FBSA. In addition, the Court is of the opinion that Plaintiff's claim is not permitted by the FBSA's "savings clause".

DISCUSSION

On May 7, 1995, the Plaintiff, Steve Lady, was operating a personal water craft commonly called a "jet ski". Richard Rychetsky, one of the Plaintiff's friends, was following in a boat. The tow vessels suddenly collided. As a result of the impact, Plaintiff was thrown from his jet ski and under Rychetsky's boat. Plaintiff was severely injured when he came into contact with the boat's moving propeller. A products liability claim was subsequently filed against OMC, the manufacturer of Rychetsky's boat. The gravamen of Plaintiff's complaint is OMC's failure to provide a propeller guard.[1] OMC argues that Plaintiff's state common law claims, based upon the failure of Defendant to install propeller guards, are preempted by the FBSA, 46 U.S.C. § 4303. Plaintiff disagrees and further contends that the § 4311(g) savings clause permits maintenance of his product liability claim.

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[1] In his complaint, Plaintiff also alleged that the boat had a defective throttle. In particular, Lady contended that "the boat and engine were defective because when the operator, Mr. Rychetsky, placed the throttle into neutral prior to impact, the propeller did not cease rotating." Defendants' Memorandum in Support of Motion for Summary Judgment, p. 2, citing Plaintiff's complaint, ¶¶ 13, 15 and 31. However, Plaintiff has since conceded that there is no proof of a throttle defect and that "the portion of the manufacturer's Motion for Summary Judgment as to the claim for the allegedly defective throttle should be granted." *See* Plaintiff's Response, ¶ 4.

Congress enacted the Federal Boat Safety Act, 46 U.S.C. § 4301 et. seq., in part "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating–presently the Secretary of Transportation." P.L. 92-75, Federal Boat Safety Act of 1971, S. Rep. No. 92-248. The FBSA preemption clause, 46 U.S.C. § 4306 provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

Thus, § 4306 preempts state laws or regulations that are not identical to regulations promulgated under the Act. The United States Coast Guard has been delegated the exclusive authority to establish safety regulations under the FBSA. 49

C.F.R. § 1.46(n)(1). Before promulgating a regulation, the Coast Guard is required to consult with the National Boating Safety Advisory Council ("the Advisory Council") on the need for regulation. 46 U.S.C. § 4302(c)(4). In 1988, the Coast Guard directed the Advisory Council to examine the feasibility and potential safety advantages and disadvantages of propeller guards. In response, the Advisory Council appointed a Propeller Guard Subcommittee "to consider, review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers." National Boating Safety Advisory Council, Report of the Propeller Guard Subcommittee 1 (1989). After reviewing the available scientific data and testimony, the Subcommittee concluded that propeller guards would not increase overall safety, because they increased the chances of contact between a blunt object and a person in the water. Consequently, the Advisory Council Subcommittee recommended that the Coast Guard take no regulatory action to require propeller guards. Acting upon the recommendation of the Advisory Council, and concluding that available accident data did not support the imposition of a regulation requiring propeller guards on motorboats, the Coast Guard decided no to implement regulations requiring propeller guards.

The Eleventh and Eighth Circuits have held that the FBSA preempts propeller guard product liability claims. *Lewis v. Brunswick Corp.* 107 F.3d 1494 (11th Cir. 1997); *Carstensen v. Brunswick Corp.* 49 F.3d 430 (8th Cir. 1995). In addressing the issue, this Court held in *Parker v. Outboard Marine Corp.*, No J90-001 (L), slip op. at 2-3 (S.D. Miss.

Feb. 25, 1991)(order granting summary judgment) (citations omitted), that "[t]he Coast Guard's decision not to require propeller guards 'takes on the character of a ruling that no such regulation is appropriate', and precludes states from imposing liability based on the absence of such guards. . . A state common law action seeking to impose liability for the failure to have a propeller guard is preempted." In *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 384, 103 S.Ct. 1905, 1912, 76 L.Ed. 2d 1 (1983), the court held that "a federal decision to forgo regulation in a given area may imply an authoritative decision federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate. Plaintiff correctly points out that a decision not to regulate does not always have a preemptive effect. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) (holding that the National Traffic and Motor Vehicle Safety Act did not expressly preempt state common-law design defect claims against manufacturers of trucks not equipped with antilock braking systems); *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503, 108 S.Ct. 1350, 1355, 99 L.Ed.2d 582 (1988). However, preemption does apply "where [the] failure of. . . federal officials affirmatively to exercise their full authority takes on the character of ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178, 98 S.Ct. 988, 1044, 55 L.Ed. 2d 179 (1978) (citations omitted). The court's decision in *Freightliner* noted that :the lack of federal regulation did not result form an affirmative decision of agency officials to refrain from

regulating air brakes". *Freightliner Corp. v. Myrick*, 514 U.S. at 286, 115 S.Ct. 1487. In contrast, the Coast Guard, did make an informed decision to refrain from regulating propeller guards. The Coast Guard's decision not to regulate installation of propeller guards has the same preemptive force as a decision to regulate. Therefore, to allow a jury to assess damages for failure to provide a propeller guard would, in effect, create a state regulation that guards be installed. Such a requirement would not be identical to any prescribed under the FBSA and is therefore forbidden by FBSA's preemption clause. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992)(holding that a state regulation can be as effectively exerted through an award of damages and that the obligation to pay compensation can be, and is designed to be, a potent method of governing conduct and controlling policy).

Plaintiff also asserts that his common law claims are permitted under the FBSA's savings clause. The FBSA savings clause, 46 U.S.C. § 4311(g) provides:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liablity at common law or under State law.

The purpose of this provision is "to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a

complete defense to liability." S. Rep. No. 248, 92d Cong., 1st Sess., *reprinted in* 1971 U.S. Code Cong. & Admin. News 1333, 1353. From the savings clause, it is clear that Congress intended that some products liability claims could be maintained in accord with the FBSA's regulatory scheme. However, to be viable, such claims cannot conflict with the Coast Guard's exclusive authority to regulate boating equipment. "Permitting product liability claims against manufacturers for negligent or defective design of products required by the Coast Guard, or for products provided voluntarily by manufacturers, simply requires manufacturers to comply with FBSA regulations, and to do any additional manufacturing, in a non-negligent and non-defective manner. Permitting such claims is consistent with the FBSA scheme, which is designed to ensure that boats and associated equipment are safe. By contrast, claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the FBSA." *Lewis v. Brunswick Corp.*, 107 F.3d at 1505. The Coast Guard consciously determined that propeller guard regulation was imprudent. On the other hand, no provision of the FBSA prohibits the use of propeller guards. Therefore, in the absence of a federal requirement, manufacturers could choose to install them. Under those circumstances, if the manufacturer installed a defectively designed propeller guard, § 4311 (g) would preclude FBSA preemption as a defense. However, § 4311 (g) does not apply where the manufacturer merely chooses not to install a device or appliance which the FBSA does not require.

IT IS THEREFORE ORDERED AND

ADJUDGED, that for the reasons stated above, there exists no genuine issue of material fact and Defendants, Outboard Marine Corporation and Recreational Boat Group Limited Partnership, are entitled to judgment as a matter of law. Defendants' Motion for Summary Judgment, filed September 8, 1998, pursuant to FED. R. CIV. P. 56, should be, and is hereby **GRANTED**.

SO ORDERED AND ADJUDGED, this the 7th day of May, 1999.

/S/

Louis Guirola, Jr.

U.S. Magistrate Judge

(2)

Supreme Court, U.S.
FILED
FEB 23 2001
OFFICE OF THE CLERK

No. 00-1031

IN THE

Supreme Court of the United States

STEVEN G. LADY,

Petitioner,

v.

OUTBOARD MARINE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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34 pp

QUESTION PRESENTED

Did the court below properly apply this Court's well-established preemption precedents, including *Geier v. American Honda Motor Co.* and *United States v. Locke* (both decided last Term), to hold that petitioner's Mississippi tort claim, which alleges that Outboard Marine Corporation had a duty to install propeller guards on its boats, is preempted by the Federal Boat Safety Act?

CORPORATE DISCLOSURE STATEMENT

Respondent Outboard Marine Corporation is a privately held corporation. No parent or publicly held company owns 10% or more of Outboard Marine Corporation's stock. On December 22, 2000, Outboard Marine Corporation filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Illinois.

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RESPONDENT'S BRIEF IN OPPOSITION

The petition for certiorari ("Pet.") should be denied. The decision below, finding implied preemption of petitioner's Mississippi tort claim, was a careful, narrow, and correct application of this Court's preemption precedents, including *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913 (2000), and *United States v. Locke*, 529 U.S. 89 (2000), both of which were decided only last Term. No court of appeals decision conflicts, or is alleged to conflict, with the decision below. Nor, for that matter, is there any conflict with the Texas Supreme Court's seven-year-old decision in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994), as that decision did not issue an implied preemption holding and, in all events, relied on lower federal-court decisions since repudiated by this Court. To the extent that this case is said to involve issues similar to those in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir.), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998), there is no longer a need for certiorari: This Court's intervening preemption decisions (*e.g.*, *Geier* and *Locke*), which were applied by the court of appeals below, have now resolved the fundamental preemption issues presented in that case. Finally, there are serious vehicle problems with the present case owing to the bankruptcy of respondent Outboard Marine Corporation ("OMC"), which raises substantial issues about this Court's power even to consider Lady's petition.

STATEMENT OF THE CASE

A. The Federal Boat Safety Act of 1971

The Federal Boat Safety Act of 1971 ("FBSA") was specifically designed to "improve boating safety and to foster greater development, use, and enjoyment of all the waters of the United States." P.L. 92-75, § 2, 85 Stat. 213, 214 (1971) (codified as amended at 46 U.S.C. §§ 4301-4311). A significant increase in the number of recreational boaters in the

United States required "a coordinated national boating safety program." S. Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. 1333, 1333. With respect to boat design, the method Congress selected for implementing this "coordinated national . . . program" was "establishment of national construction and performance standards for boats and associated equipment." P.L. 92-75, § 2, 85 Stat. at 214. This decision reflected Congress's balancing of safety and economic policies: "The need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." S. Rep. 92-248, 1971 U.S.C.C.A.N. at 1335.

The FBSA's structure reflects Congress's intent to accommodate safety and economic concerns. The statute "improve[s] boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the . . . Secretary of Transportation." *Id.* at 1333. The FBSA authorizes the Coast Guard, as the delegate of the Secretary of Transportation (*see* 49 C.F.R. § 1.46(n)(1)), to promulgate comprehensive national boat construction and performance standards:

> The Secretary may prescribe regulations —
>
> (1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards with each standard —
>
> (A) meeting the need for recreational vessel safety; and
>
> (B) being stated, insofar as practicable, in terms of performance;

> (2) requiring the installation, carrying, or use of associated equipment . . . .

46 U.S.C. § 4302(a). Congress recognized that "[w]hile the language of [section 4302(a)] is permissive and not mandatory, . . . initial standards will be promulgated as soon as practicable." S. Rep. 92-248, 1971 U.S.C.C.A.N. at 1338. "In prescribing regulations under this section," the FBSA also requires the Coast Guard to consult with the National Boating Safety Advisory Council ("NBSAC"), an expert body established by federal statute. 46 U.S.C. § 4302(c)(4); *see id.* § 13110.

Consistent with the "long history of preemption in maritime safety matters" (S. Rep. 92-248, 1971 U.S.C.C.A.N. at 1341), the FBSA preserves national uniformity by "preempt[ing] the field on boating standards or regulations." H.R. Rep. 92-324, at 11 (1971). The Coast Guard in particular had long pushed for a broad preemption provision in the FBSA. It was concerned with the "real and potential problem" of the states "developing requirements of their own law which are varied," resulting in a "lack of uniformity [that] is inconvenient and costly to manufacturer and boatman alike." *Hearings on H.R. 15041 Before the Subcomm. on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong. at 67 (1970) (statement of Adm. McClelland, Chief of the Office of Boat Safety, U.S. Coast Guard); *see also Hearings on S. 696 Before the Merchant Marine Subcomm. of the Comm. on Commerce*, 92d Cong. at 50 (1971) (statement of Adm. Bender, Commandant, U.S. Coast Guard). Accordingly, Congress included in the FBSA a broad preemption clause that establishes the Coast Guard as the exclusive source of recreational boat safety standards:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation

> establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306.

Section 4306's three express exceptions are each consistent with the FBSA's purpose of "provid[ing] uniform standards without the imposition of excessive special requirements by individual states." H.R. Rep. 98-338, *reprinted in* 1983 U.S.C C.A.N. 924, 972. States may (i) enforce standards that are "identical" to federal regulations; (ii) apply to the Secretary of Transportation for an exemption from preemption; and (iii) "regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State." 46 U.S.C. §§ 4305, 4306.

The last provision in the FBSA states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." *Id.* § 4311(g). Congress explained that the provision, added as a "technical amendmen[t]" just before passage (117 Cong. Rec. 28,036 (July 29, 1971)), is intended only "to clarify" that

> mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

S. Rep. 92-248, 1971 U.S.C.C.A.N. at 1352. Given the comprehensiveness of the FBSA's regulatory scheme, and the

unique federal interest in maritime safety matters, this provision "clarifies" that states may still exert regulatory authority in limited circumstances. For example, Congress specifically disclaimed intent to "preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern." *Id.* at 1341.

B. The Coast Guard's Studied Decision Not To Require Propeller Guards on Recreational Boats

Pursuant to its delegated authority, the Coast Guard began implementing a federal scheme of recreational boat safety regulation the day after the FBSA took effect. Because the Coast Guard understood section 4306 to preempt all state law setting recreational boat safety requirements, as a stop-gap measure it immediately exempted from preemption all state boat safety law "in effect on the effective date of the [FBSA]." 36 Fed. Reg. 15,764-65 (Aug. 11, 1971); *see* Pet. App. 37 n.21. About a year later, the Coast Guard issued a comprehensive set of federal regulations governing recreational boat design and performance. *See* 37 Fed. Reg. 15,776-85 (Aug. 4, 1972). These regulations cover a broad spectrum—*e.g.*, personal flotation devices; ventilation, fuel, and electrical systems; and flotation requirements. *See generally* 33 C.F.R., subch. S (1998). After issuing the regulations, the Coast Guard eliminated the blanket state-law exemption. *See* 38 Fed. Reg. 6914-15 (Mar. 8, 1973).

In 1988, the Coast Guard decided to determine whether to "move towards a federal requirement for some form of propeller guard." NBSAC, *Report of the Propeller Guard Subcomm.* App. A (Nov. 7, 1989) (hereafter "NBSAC Rep."). It charged NBSAC to:

> Review the available data on the prevention of propeller-strike accidents and the Coast Guard study of various

> methods of shrouding propellers to prevent contact with a person in the water[; and]
>
> Assess the arguments for and against some form of mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public.

Id. NBSAC appointed a Propeller Guard Subcommittee ("Subcommittee") to carry out this task. *See* NBSAC Rep. at 1.

The Subcommittee was made up of representatives from numerous constituencies interested in the propeller guard issue, including state boat safety officials, members of recreational boating organizations, members of the general public, and representatives of the recreational boating industry. *See* NBSAC Rep. App. F. The Subcommittee conducted an exhaustive 18-month study to determine whether propeller guards would improve boating safety "without at the same time (a) creating some other hazard; (b) materially interfering with normal operations; or (c) being at economic costs disproportionate to the particular risk." NBSAC Rep. at 20.

Throughout its study, the Subcommittee published Federal Register notices of its public meetings (held in various locations around the country) and invited oral and written commentary from all interested parties.* *See id.* at 2-3. Public response to the Subcommittee's invitation was tremendous. The Subcommittee received oral testimony from and reviewed written reports by proponents and opponents of a recreational boat propeller guard requirement: medical experts, victims of propeller strike injuries, attorneys for propeller strike victims, engineers, propeller guard manufacturers, recreational boat

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* *See* 53 Fed. Reg. 33,210 (1988); *id.* at 43,070; *id.* at 43,069; 54 Fed. Reg. 15,068 (1989); *id.* at 15,066; *id.* at 42,138.

manufacturers, academic researchers, the Coast Guard, and lifeguard organizations. *See* NBSAC Rep. at 1-4 & App. B, App. C.

The Subcommittee considered numerous other sources of information relevant to its task. It took note that propeller guard advocates had engaged in a state-by-state campaign to require propeller guards via lawsuits and lobbying efforts. *See* NBSAC Rep. at 4-5. It reviewed detailed statistical analyses of the frequency of propeller guard accidents as compared to accidents that occur during other recreational activities. *See id.* at 9-10. It reviewed the design and performance characteristics of every type of propeller guard on the market, and even conducted on-water tests of propeller guards. *See id.* at 13-17.

At the end of the study, the Subcommittee reached a number of conclusions. It found that, relative to the number of serious injuries that occur in other outdoor recreational activities generally and boating accidents in particular, propeller strike injuries are exceedingly rare. *See* NBSAC Rep. at 9-10, 24 & App. F. And even with regard to these rare injuries, in which "[o]perator inexperience, incompetence, negligence, and alcoholic intake are significant contributing factors" (*id.* at 11), the Subcommittee concluded that propeller guards "at best . . . have only a negligible impact on improving boating safety." NBSAC Rep. at 23.

Moreover, the Subcommittee found that all types of propeller guards "can . . . be counter-productive and can create new hazards of equal or greater consequence" (*id.*) because they "present[] an underwater profile of significantly larger frontal area, thereby increasing the chances of contact" and "blunt trauma injury" (*id.* at 20), which is "often more severe" than propeller-inflicted cutting wounds (*id.* at 18-19). Furthermore, at speeds of greater that 10 miles per hour (speeds at which "approximately 80% of all accidents occur," *id.* at 11), propeller guards "affect boat operation adversely."

Id. at 21. "In the hands of an inexperienced or negligent operator, a serious accident could result." *Id.* at 16.

Finally, in addition to the general problems inherent in all types of propeller guards, the Subcommittee found specific drawbacks for each available propeller guard design. "Ring guard" designs allowed "fingers, hands, arms, etc. [to] enter the ring and contact the propeller." *Id.* at 12. "Cage guard" designs were feasible only for boats that "operate at very slow speeds (approximately 2 miles per hour or less) where problems of efficiency, structural integrity and boat handling are negligible" and "[n]o evidence indicated that this solution had any validity for normal use of pleasure boats at normal planing speeds." *Id.* at 15. A third design, the "Kort nozzle," was found to be inadequate as "[n]o example of any nozzle device suitable for recreational boat use at normal operating speeds was brought to the attention of the Subcommittee." *Id.* In summary, "[n]o simple universal design suitable for all boats and motors in existence ha[d] been described or demonstrated to be technologically or economically feasible." *Id.* at 22.

Acknowledging that "the controversy which currently surrounds the issue is, by its very nature, highly emotional and has attracted a great deal of publicity," the Subcommittee nonetheless concluded that "there are no indications that there is a generic or universal solution currently available or forseeable in the future." *Id.* at 24. Accordingly, the Subcommittee *unanimously* recommended that "[t]he U.S. Coast Guard . . . take *no regulatory action to require propeller guards*." *Id.* at 24 (emphasis added). Instead, the Subcommittee recommended that an emphasis on boater education was far preferable to requiring propeller guards: "The most rational approach to the problem [of propeller strikes] is to educate boaters, especially operators" because "[o]perator error is clearly a significant factor in the vast majority of underwater impacts which result in injuries [and]

fatalities." *Id.* at 23. In fact, the Subcommittee warned that imposing a propeller guard requirement would only "misle[a]d [the public] into thinking there is a 'safe' device which would eliminate or significantly reduce such injuries or fatalities." *Id.* at 24.

NBSAC received the Subcommittee's report at its annual meeting. It unanimously "accept[ed] the report, adopt[ed] the recommendations of the subcommittee, and discharge[d] the subcommittee as having completed its task." *Minutes of the 44th Meeting of the National Boating Safety Advisory Council* 19 (Nov. 6-7, 1989).

NBSAC forwarded the report and all supplementary materials to the Coast Guard, which, after careful review, accepted "[a]ll of the report's recommendations." Letter from Rear Admiral, U.S. Coast Guard, Robert T. Nelson, Chief, Office of Navigation Safety and Waterway Services to A. Newell Garden, Chairman, National Boating Safety Advisory Council at 1 (Feb. 1, 1990). The Coast Guard specifically noted that "available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats." *Id.*

C. The Proceedings Below

On May 7, 1995, petitioner Lady was operating a jet ski on the waters of Bayou La Croix, Mississippi. Richard Rychetsky was following closely in a motorboat. The two craft were traveling at 30 to 35 miles per hour within 20 feet of each other. When Rychetsky blew the horn on his boat, Lady reacted by making a hard left turn directly into the path of Rychetsky's boat, precipitating a collision. Lady was thrown from his jet ski, and the propeller on Rychetsky's boat struck and injured him. Pet. App. 2.

Lady settled his claims against Rychetsky (Pet. App. 3 n.1) and then filed product liability claims against Neal Glaser Marine, Inc., the distributor of Rychetsky's boat, and OMC,

the manufacturer, alleging that each breached a duty to install a propeller guard. Pet. App. 3. After OMC removed the case to federal court, Lady dismissed his claims against Neal Glaser Marine. *Id.*

The district court joined every federal court to decide the issue by ruling that the FBSA preempted Lady's claims. Pet. App. 40-47. The district court based its ruling on both express and implied preemption grounds: It held that the language of the FBSA expressly "preempts state laws or regulations that are not identical to regulations promulgated under the Act" (Pet. App. 42) and that, given "[t]he Coast Guard's decision not to regulate the installation of propeller guards," any tort-law-imposed propeller guard requirement "would not be identical to any [regulation] prescribed under the FBSA." Pet. App. 45. The court also held that a state-tort-law-imposed propeller guard requirement would conflict with the Coast Guard's "informed decision to refrain from regulating propeller guards" and, thus, that Lady's claims were impliedly preempted. *Id.*

The court of appeals affirmed. After observing that every federal court to decide this issue has held that the FBSA preempts propeller guard claims (Pet. App. 5-6), the court reviewed in detail the Coast Guard's exhaustive investigation of propeller guards. Pet. App. 7-18. The court then reviewed the numerous decisions of this Court, including the decision last Term in *United States v. Locke*, 529 U.S. 89 (2000), emphasizing that matters of maritime safety and commerce are "traditionally regulated by the federal government." Pet. App. 18-21. Because the FBSA likewise governs matters within "the historic federal maritime jurisdiction," the court of appeals held that "a presumption against preemption does not guide [the] analysis of whether federal law precludes Lady's common-law tort claims against OMC." Pet. App. 21.

Turning to the district court's express preemption holding, the court of appeals rejected Lady's assertion that the

language of the FBSA's preemption provision could not include tort claims, noting that a long line of this Court precedents "has interpreted language similar to section 4306's to include state common-law tort actions." Pet. App. 24. When assessing Lady's argument that the FBSA's so-called "savings" clause preserved tort actions, the court reviewed this Court's recent decision in *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913 (2000), concerning the express preemptive reach of the Motor Vehicle Safety Act ("MVSA"). The court agreed that, like the MVSA, the FBSA contains a "savings" clause, but it also noted that the language of the FBSA's preemption and savings provisions differs significantly from the MVSA. Pet. App. 23-24. Still, concerned that *Geier* "precludes a broad reading of [an] express preemption provision" in "the presence of [a] savings clause," the court of appeals was "unable to conclude" that the FBSA expressly preempted Lady's claims. Pet. App. 27.

The court of appeals next turned to the district court's implied preemption holding. At the outset, the court held that the fact that an action is not expressly preempted by federal law "does not 'foreclose[] any possibility of implied preemption,'" a principle made clear by a number of this Court's decisions (including, most recently, *Geier*). Pet. App. 28 (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995), and citing *Geier* and *Locke*). The court then rejected Lady's argument that "*Freightliner*'s teachings . . . preclude implied preemption in the present case" because the Coast Guard did not promulgate a regulation concerning propeller guards on recreational boats: "In contrast to *Freightliner* . . . the lack of a regulation mandating propeller guards on recreational boats came after the Coast Guard studied the matter and affirmatively determined that requiring propeller guards was substantively inappropriate." Pet. App. 31. Moreover, the court of appeals pointed out, this Court repeatedly has held that "'a federal decision to forgo regulation in a given area may imply an authoritative federal

determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate.'" Pet. App. 33 (quoting *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)). Specifically with regard to Coast Guard regulation of maritime safety matters, "the relevant inquiry [is] 'whether the Coast Guard promulgated its own requirement on the subject *or has decided that no such requirement should be imposed at all.*'" Pet. App. 34-35 (emphasis added) (quoting *Locke*, 529 U.S. at 109).

The court of appeals found that at the conclusion of an exhaustive examination of a possible propeller guard requirement, the Coast Guard reached a "considered decision that, on the merits of the matter, imposing a requirement for propeller guards was substantively inappropriate." Pet. App. 36. Just as the Department of Transportation in *Geier* had chosen to afford automobile manufacturers flexibility in selecting restraint systems, the Coast Guard explicitly "cho[se] . . . to leave manufacturers with the option of whether or not to attach a propeller guard and, if so, what type." Pet. App. 35-36. According to the court of appeals, allowing Lady to pursue his damages action "would effectively require boat manufacturers to install propeller guards, in direct contravention to the Coast Guard's policy." Such a rule of law "would present an obstacle to and frustrate the flexible approach towards propeller guards adopted by the Coast Guard," precisely the type of regulatory interference struck down in *Geier*. Pet. App. 36.

The court of appeals made clear that its decision was extremely narrow:

> We do not hold that simply because the Coast Guard has not acted on a safety matter that state action is precluded. Rather, where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a

> requirement, that decision takes on the character of a regulation and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's.

Pet. App. 37. It further limited the holding to tort actions like Lady's: "We also conclude that product liability claims based on the defective design, manufacture, or installation of products that are already installed and not subject to Coast Guard regulation are also not preempted." Pet. App. 38 n.22.

Finally, the court of appeals rejected Lady's contention that it should defer to the Solicitor General's view, presented in an *amicus* brief in *Lewis v. Brunswick Corp.*, No. 97-288, that the FBSA does not preempt propeller guard suits. In this case, neither the Solicitor General's nor the Department of Transportation's views on the preemptive scope of the FBSA were before the court of appeals. Pet. App. 38 n.23. In any event, the court held, the issue had no bearing on the outcome of the case: "[E]ven if we were to consider the position taken by the Solicitor General in *Lewis*, the weight we would place on it would not be sufficient to overcome the reasons supporting the application of implied preemption." *Id.*

REASONS FOR DENYING THE PETITION

This is not an appropriate case for certiorari. Only last Term, the Court established in *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913 (2000), a framework by which courts are to determine the preemptive effect of a federal statute that contains both express preemption and savings clauses. And in *United States v. Locke*, 529 U.S. 89 (2000), the Court reemphasized that when applying conflict preemption principles to federal statutes that "bear upon national and international maritime commerce," there "is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Id.* at 108. The opinion below carefully applied these precedents to hold that

Lady's Mississippi tort claim is impliedly preempted by the FBSA, and carefully limited its decision to the particular regulatory circumstances and specific cause of action before it. Moreover, there is no split of authority on the question: The decision below accords with every decision rendered by a federal court on the preemptive effect of the FBSA. And Lady's assertion that the decision below conflicts with *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994), is misplaced: That case did not issue an implied preemption holding and, in any event, premised its discussion of implied preemption on cases and theories this Court has since explicitly rejected. Finally, and wholly apart from the lack of merit in the petition, OMC's bankruptcy filing creates a serious impediment to this Court's ability to consider this case. The automatic stay in bankruptcy precludes Lady from proceeding against OMC unless and until he obtains a lifting of that stay in bankruptcy court, a procedural maneuver that would be unwarranted, and that OMC would vigorously contest.

I. THE FIFTH CIRCUIT'S NARROW APPLICATION OF THIS COURT'S PREEMPTION PRECEDENTS CREATES NO CONFLICT WITH ANY DECISION OF THIS COURT, ANY LOWER FEDERAL COURT, OR ANY STATE COURT OF LAST RESORT

A. The Decision Below Was Extremely Narrow

The court of appeals made clear that its decision was extremely narrow. It expressly foreclosed any reading of its opinion for the proposition that mere regulatory inaction carries preemptive effect. Rather, the court below held that its decision turned on the particular regulatory circumstances presented. The "Coast Guard ha[d] been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement." Pet. App. 37; *see also* Pet. App. 7-18 (reviewing the Coast

Guard's lengthy and elaborate propeller guard study). Accordingly, the Coast Guard's "decision t[ook] on the character of a regulation and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's." *Id.*

Not only did the court below limit its holding to the specific regulatory circumstances before it, it also strictly limited the types of tort claims to which its preemption holding could be applied. The court held that "product liability claims based on the defective design, manufacture, or installation of products that are already installed and not subject to Coast Guard regulation are also not preempted." Pet. App. 38 n.22 (citation omitted).

Thus, contrary to Lady's characterization, the decision below is far from a "deep encroachment on the rights of the States to protect their citizens and of citizens to use the common law to protect themselves." Pet. 21. It is a narrow (and correct) application of this Court's precedents. Indeed, the court of appeals showed tremendous restraint in its holding; the court noted significant differences between the preemption and savings provisions of the MVSA (interpreted in *Geier*) and the FBSA (Pet. App. 23-24), and could properly have issued a broader ruling that the FBSA expressly preempts tort claims like Lady's.

B. The Decision Below Was Correct And Does Not Conflict With Any Decision Of This Court

The court below faithfully applied this Court's preemption case law in holding that the FBSA impliedly preempts Lady's tort claim. Thus, there is no error in the decision below that requires this Court's intervention.

In the courts below, Lady's principal argument against implied preemption was that the presence of an express preemption clause in the FBSA barred any consideration of an implied preemption theory. Whatever plausibility this

argument may have once had, the court of appeals correctly held that *Geier* disposed of it once and for all. Pet. App. 28; *see Buckman Co. v. Plaintiffs' Legal Comm.*, No. 98-1768, slip op. at 10 (U.S. Feb. 21, 2001) (this argument "must fail in light of our conclusion last Term in *Geier*). Lady does not contend that this holding was in error, nor could he. Indeed, Lady's curious decision (Pet. 24) to minimize the importance of *Geier* by mentioning it only once, and then only in a passing "see also" citation, cannot be explained by mere accident — his counsel also represented the petitioner in that case.

The court of appeals acknowledged (Pet. App. 32-33) this Court's repeated holdings that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (emphasis in original); *accord, e.g, Locke*, 529 U.S. at 109; *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988); *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178 (1978). Here, the Coast Guard was "presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a [propeller guard] requirement." Pet. App. 37. Thus, just as in *Geier*, "the rule of law sought to be imposed by Lady would present an obstacle to and frustrate the flexible approach towards propeller guards by the Coast Guard." Pet. App. 36.

Lady does not take issue with the principle that a decision to forgo regulation can have preemptive effect. *See* Pet. 18. Rather, Lady merely contends that the court below misapplied that well-established principle. Citing *Freightliner*, Lady argues that "the mere absence of federal regulation . . . has no preemptive effect whatsoever." Pet. 16. But the court below did not rely on "the mere absence of federal regulation" to ground its decision: "In contrast to *Freightliner* . . . the lack

of a regulation mandating propeller guards on recreational boats came after the Coast Guard studied the matter and affirmatively determined that requiring propeller guards was substantively inappropriate." Pet. App. 31.

Lady next contends that the court below erred by refusing to apply a presumption against preemption. Pet. 21-23. Again, there was no error. In *Locke*, this Court reaffirmed that, in areas such as federal regulation "bear[ing] upon national and international maritime commerce," "where there has been a history of significant federal presence," there is no presumption against preemption. 529 U.S. at 108. Indeed, when it enacted the FBSA, Congress invoked just such a "history of significant presence" by noting that the Act's preemption provisions were consistent with the "long history of preemption in maritime safety matters" and expressly stated a "need for uniformity applicable to vessels moving in interstate commerce." S. Rep. 92-248, 1971 U.S.C.C.A.N. at 1341. This Court likewise has held that regulation of safe recreational boat operation in territorial waters bears on national maritime commerce. *See Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 675 (1982). The court below properly applied these precedents in holding that the presumption against preemption did not apply. Pet. App. 18-21.

Finally, Lady contends that the court below erred by not affording deference to the Solicitor General's brief in *Lewis v. Brunswick Motors*, No. 97-288, which urged that the FBSA does not preempt tort claims. Pet. 24-25. This issue provides no basis for this Court's review because it had no bearing on the decision below. The court of appeals acknowledged this Court's statement in *Geier* that, in some circumstances, the views of an agency expressed in a brief of the Solicitor General may be entitled to "some weight." Pet. App. 38 n.23 (quoting *Geier*, 120 S. Ct. at 1926). But, the court held, "even if we were to consider the position taken by the

Solicitor General in *Lewis*," the arguments made in that brief "would not be sufficient to overcome the reasons supporting the application of implied preemption." Pet. App. 38 n.23. Moreover, the Solicitor General's brief in *Lewis* did not purport to represent the position of either the Coast Guard or the Department of Transportation, as neither agency joined that brief. *Cf.* Br. *Amicus Curiae* of the United States, *Geier v. Am. Honda Motor Co.*, 120 S. Ct. 1913 (2000) (signed by the Department of Transportation); Br. for the United States, *United States v. Locke*, 529 U.S. 89 (2000) (same). Nor could it have, as the Coast Guard has consistently taken the position that the FBSA preempts tort claims like Lady's. *See* Pet. App. 37 n.21; *supra* pp. 3-5. And the Coast Guard, not the Solicitor General, has been delegated authority to administer the FBSA, a necessary prerequisite to administrative deference. *See Geier*, 120 S. Ct. at 1926; *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

C. The Decision Below Does Not Conflict With Any Decision Of A Lower Federal Court Or State Court Of Last Resort

There is no split of authority concerning the preemptive effect of the FBSA. The Fifth Circuit's decision accorded with the results reached by *every* federal court to consider the issue. *See Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1505-06 (11th Cir.), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998); *Carstensen v. Brunswick Corp.*, 49 F.3d 430, 433 (8th Cir. 1995); *Moss v. Outboard Marine Corp.*, 915 F. Supp. 183, 186 (E.D. Cal. 1996); *Davis v. Brunswick Corp.*, 854 F. Supp. 1574, 1581-82 (N.D. Ga. 1993); *Shield v. Bayliner Marine Corp.*, 822 F. Supp. 81, 84 (D. Conn. 1993); *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579, 1582 (M.D. Ga. 1991); *Mowery v. Mercury Marine*, 773 F. Supp. 1012, 1016 (N.D. Ohio 1991); *Parker v. Outboard Marine Corp.*, No. J90-001(L), slip op. at 2-3 (S.D. Miss. Feb. 25, 1991). It likewise accords with decisions

of state courts. *See, e.g., Ryan v. Brunswick Corp.*, 557 N.W.2d 541, 548-49 (Mich. 1997); *Farner v. Brunswick Corp.*, 607 N.E.2d 562, 566-67 (Ill. App. Ct. 1992).

In the face of this overwhelming and unanimous body of federal authority, Lady asserts that the Texas Supreme Court's split decision in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994), is in "direct" conflict (Pet. 12) with the decision below. It is not. *Moore* and the decision below each held that the FBSA does not expressly preempt tort claims based on a failure to install a propeller guard. Pet. App. 27-28; *Moore*, 889 S.W.2d at 249-51. On that score, Lady cannot, and does not, claim a split of authority.

Neither does *Moore* conflict with the court of appeals' decision on the issue of implied preemption, for that issue was not squarely presented or decided in *Moore*. The Texas court simply noted that a position taken by the boat manufacturers "resemble[d] an implied preemption argument," which the court considered only "[f]or purposes of . . . discussion." 889 S.W.2d at 251 n.10. To the extent that the *Moore* court even can be said to have addressed an implied preemption argument, it issued no holding on the point; rather, it opined only that there "arguabl[y]" was no conflict between the Coast Guard's studied decision not to require propeller guards on recreational motorboats and a state tort claim premised on an alleged duty to install a propeller guard. *Id.* at 251.

Indeed, *Moore*'s reluctance to address an implied preemption argument stemmed from a reading of various decisions of this Court and the lower federal courts as "question[ing] the propriety of an implied preemption analysis when presented with an express preemption analysis." *Id.* at 251 n.10. This Court's decisions in *Freightliner*, *Geier*, and *Buckman Co.*, rendered after *Moore*, have now made crystal-clear that the presence of an express preemption clause does not alter in any way a court's obligation to undertake a full

implied preemption analysis. *See Buckman Co.*, No. 98-1768, slip op. at 10; *Geier*, 120 S. Ct. at 1919; *Freightliner*, 514 U.S. at 287-89. In fact, the three *Moore* dissenters accurately predicted that the majority's view would not withstand scrutiny. 889 S.W.2d at 254-55 (Phillips, C.J., dissenting). And there is no reason to believe that the Texas court would continue to follow its discredited prior opinion; that court has since explicitly recognized its obligation to follow this Court's binding implied-preemption decisions such as *Buckman Co.*, *Geier*, and *Freightliner*. *See, e.g., Worthy v. Collagen Corp.*, 967 S.W.2d 360, 367 (Tex. 1998) ("We are also bound to follow the decisions of the United States Supreme Court, the final authority on federal preemption issues.").

In summary, there is no "confusion among" or split "reflected in" lower federal court decisions (Pet. 15); quite to the contrary, those decisions demonstrate a uniformity of result. The federal courts have unanimously held that the FBSA preempts tort claims based on propeller-strike injuries. Furthermore, there is no divergence between the Texas Supreme Court and the decision below: The Texas court did not reach the issue of implied preemption, and that court's discussion of the issue was grounded in a rationale now authoritatively repudiated by subsequent decisions of this Court.

D. The Court Has Already Resolved The Preemption Issues Presented In *Lewis v. Brunswick Corp.*

So, too, this Court's recent preemption decisions dispose of the major theme of Lady's petition — this Court granted certiorari in *Lewis*, so it should do so here, too. Pet. 11-12. In the years since the Court dismissed *Lewis*, it has resolved the fundamental preemption issues that had been presented in that case. Accordingly, there is no basis for certiorari in this case.

The petition in *Lewis* presented two related questions. The

first was whether "it is constitutionally permissible to imply the federal pre-emption of state common law claims" when a statute contains express preemption and savings clauses. Pet. for Cert., *Lewis v. Brunswick Corp.*, No. 97-288, at i (emphasis omitted). The second was whether, in light of a savings clause, "torts of omission [can be] impliedly pre-empted." *Id.* The Court answered these questions last Term in *Geier*. The Court held that the presence of an express preemption provision and a savings clause "does *not* bar the ordinary working of conflict pre-emption principles." 120 S. Ct. at 1919 (emphasis in original). Furthermore, the cause of action in *Geier* was itself a "tort of omission"; the plaintiff alleged that an automobile manufacturer negligently failed to install air bags. *Id.* at 1916-17. This fact did not alter the preemption analysis at all; the question remains whether the cause of action "actually conflicts" with the federal regulatory scheme either by making it "'impossible' for private parties to comply with both state and federal law" or by "frustrat[ing] the accomplishment of a federal objective." *Id.* at 1921-22. Finally, *Geier* is part of an overall refinement of preemption analysis, as the Court decided three other cases on general preemption grounds last Term. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000); *United States v. Locke*, 529 U.S. 89 (2000).

Geier and this Court's other recent preemption decisions have clarified the general framework under which federal courts are to determine whether a federal statute preempts state law, and have specifically set forth a framework for determining whether a federal statute containing express preemption and savings clauses preempts a state tort claim. Indeed, Lady contended before the court below that the MVSA, which the Court interpreted in *Geier*, is "nearly identical to the Boat Safety Act." Pet. C.A. Br. at 22 n.7. The court below meticulously applied this Court's refined framework to find that Lady's claim was preempted, and its

decision does not conflict with any other decision addressing the preemptive scope of the FBSA. Other federal courts likewise have only just begun to apply the *Geier* framework to preemption cases. *See, e.g., James v. Mazda Motor Corp.*, 222 F.3d 1323, 1326-27 (11th Cir. 2000); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 381-82 (7th Cir. 2000). Accordingly, reconsideration of the preemption framework established in *Geier* only last Term would be premature, and there is certainly no reason to take this case simply to apply that framework to a single narrow preemption issue raised by a single federal statute.

II. BECAUSE OUTBOARD MARINE CORPORATION HAS FILED FOR BANKRUPTCY, THIS CASE PRESENTS A POOR VEHICLE FOR CONSIDERING THE ISSUES PRESENTED IN THE PETITION

On December 22, 2000, OMC filed a Chapter 11 bankruptcy petition. *Outboard Marine Corp.*, Bankr. N.D. Ill. No. 00-37405 (Dec. 22, 2000). Accordingly, under 11 U.S.C. § 362(a)(1), any "continuation . . . of a judicial . . . action or proceeding against the debtor" is stayed. The automatic stay applies to "appeals in actions against the debtor as well as initial lawsuits." 3 *Collier on Bankruptcy* ¶ 362.03[3] (15th ed. 1997). Lady's claim is a judicial action that was commenced against OMC prior to its bankruptcy filing; the automatic stay thus precludes continuation of this action until such time as the bankruptcy is resolved. 11 U.S.C. § 362(c)(2). Indeed, Lady must take "any . . . action necessary to assure that [his] action does not continue" and his failure to do so will violate the stay. 3 *Collier on Bankruptcy* ¶ 362.03[3].

For Lady to continue to press his claim against OMC, he would have had to file a motion for relief from the automatic stay in the United States Bankruptcy Court for the Northern District of Illinois that demonstrated "cause." 11 U.S.C.

§ 362(d); *cf. Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) ("If respondents believed [a] Section 105 Injunction [supplementing the automatic stay] was improper, they should have challenged it in the Bankruptcy Court."). He has not. And, in any event, the only federal court to have addressed the issue directly has held that a nondebtor's "interest in having the Supreme Court review" an adverse decision is not "cause" that would justify lifting the automatic stay, because that type of interest is "identical to the interests of most . . . creditors" and "the existence of [a] petition [for certiorari] alone" does not change the calculus. *In re Ionosphere Clubs, Inc.* 133 B.R. 5, 7-8 (S.D.N.Y. 1991). Furthermore, the precise relief Lady seeks is a remand to the district court for a trial on his state-law claim, which would of course be extremely disruptive to OMC's efforts to reorganize, even putting aside the disruptive and distracting Supreme Court litigation that Lady's petition presently seeks.

Moreover, unlike the petitioner-debtor in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), OMC will not ask that the stay be lifted to allow this case to proceed in this Court. *See* Br. for Petitioner and Cross-Respondent, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), at 11 n.8 ("Upon motion of [Soler] . . . the United States Bankruptcy Court . . . vacated the automatic stay with respect to proceedings in this Court."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 814 F.2d 844, 845 (1st Cir. 1987) (the bankrupt petitioner "sought and obtained a modification of the automatic stay permitting the [Supreme Court's consideration of the] case to go forward" because it "would be in the 'best interest' of the debtor estate"). To the contrary, OMC will contest vigorously any effort to lift the stay as applied to this case, as allowing Lady to continue his unsuccessful pursuit of a large money judgment against OMC is manifestly not in the "best interest" of OMC's estate in bankruptcy.

Thus, even were the Court to desire to visit the issues presented by Lady, it should await a more appropriate vehicle for doing so. If there is indeed "further confusion among the lower courts," as Lady suggests (Pet. 15), then another opportunity will surely present itself. Indeed, counsel for petitioner is also counsel for plaintiffs in another FBSA preemption case, *Sprietsma v. Mercury Marine*, Ill. No. 89492, currently pending in the Illinois Supreme Court. Under Lady's own view, other opportunities will come; there is no basis for this Court to use this exceedingly poor vehicle simply to take the "first opportunity since *Lewis*" (Pet. 12) to address these issues.

CONCLUSION

The petition for writ of certiorari should be denied.

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No. 00-1031

IN THE

Supreme Court of the United States

Stephen G. Lady,

Petitioner,

v.

Outboard Marine Corp.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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ARGUMENT

As explained in our petition for *certiorari*, this case presents the identical question of law that was before this Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998): whether a state common-law claim that a boat engine was defectively designed because it lacks a propeller guard is preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1988 & Supp. V. 1993) ("Boat Safety Act" or "Act"), and by a decision of the United States Coast Guard not to begin developing a regulation that would require the use of propeller guards on recreational motor boats. *Lewis* settled after oral argument, before any decision was rendered in the case. This is the first opportunity for this Court to revisit this important question of federal law in the wake of *Lewis*.

OMC's main theme in opposition is that review should not be granted because decisions of this Court since *Lewis* was argued – particularly, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861,120 S. Ct. 1913 (2000) – have solved the core questions presented in this case, validated the various federal court of appeals decisions finding preemption of no-propeller-guard claims like petitioner's, and "discredited" the conflicting decision of the Texas Supreme Court in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994). OMC also claims that its recent filing of Chapter 11 bankruptcy is an independent reason why review should be denied. As we now explain, these arguments are meritless.

1. *Moore* is Still Good Law, and Directly Conflicts with the Decision Below.

OMC's central argument is that "there is no split of authority on the question" presented in this case because *Moore*

"did not issue an implied preemption holding and, in any event, premised its discussion of implied preemption on cases and theories this Court has since explicitly rejected." Opp. at 14. OMC is wrong on both counts.

First, *Moore* unquestionably *did* reach the question of whether no-propeller-guard claims are impliedly preempted by the Coast Guard's regulatory inaction. *Moore* begins with a discussion of express preemption under the Boat Safety Act, concluding that Congress did not expressly intend to preempt any common-law damage claims. *See* 889 S.W.2d at 248-51. The decision then addresses the same implied conflict preemption question presented here: whether "a jury award in this case will conflict with and undermine the goals of the Act by creating a standard requiring propeller guards, in the face of the Coast Guard's policy determination that guards should not be mandated." *Id.* at 251.

On this point, the Texas Supreme Court reasoned, first, that "the regulatory effect of damage awards is not equivalent to that of positive enactments: a manufacturer who incurs tort liability for failing to install propeller guards has a choice not available to the regulated manufacturer – installing guards on future boats or taking no action and bearing the liability as a cost of doing business." *Id.* at 251 (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988)). *Moore* then observed that a conflict with the Coast Guard's regulatory goals was unlikely given that the Propeller Guard Subcommittee Report issued by the Coast Guard's Advisory Council "mentions that manufacturers have been sued for failing to install propeller guards, and recognizes that a federal requirement of propeller guards would establish a prima facie case of manufacturer liability in some states." *Id.* at 252.

Finally, the Texas Supreme Court found that common-law claims could not reasonably be viewed as conflicting with Congress's purposes in light of the Boat Safety Act's broadly worded savings clause. *See id.* at 252. For all these reasons, *Moore* concluded that, although "[w]e recognize the potential for conflict, [we] do not think it justifies a holding of preemption." *Id.* at 251-52.[1]

Nor is OMC right in claiming that *Moore* was "discredited" by this Court's recent decision in *Geier v. Am. Honda Motor Co.*, 120 S. Ct. 1913 (2000). First, *Geier* held that the presence of a broadly worded savings clause in the National Traffic and Motor Vehicle Safety Act of 1966 (the "Motor Vehicle Safety Act"), 15 U.S.C. § 1397(k), precludes any finding of express federal preemption. *See* 120 S. Ct. at 1918. This is squarely in accord with *Moore*'s conclusion that the Boat Safety Act's similarly-worded savings clause, 46 U.S.C. § 4311(g), prohibits any finding that Congress intended expressly to preempt common-law claims. *See* 889 S.W.2d at 249-51. Second, regarding implied conflict preemption, *Geier* held that a common-law claim that an automobile was defective because it lacked an airbag conflicted with a complex federal regulation that was carefully designed to "bring about a mix of

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[1] In the face of this holding, OMC points to a footnote in which *Moore* observed that, pursuant to this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), "a number of federal circuit courts have questioned the propriety of an implied preemption analysis when presented with an express preemption clause." *Id.* at 252 n.10 (citing cases). *Moore* went on to state, however, that "[f]or purposes of this discussion . . . we address Mercury's implied preemption claims." *Id.* OMC's characterization of *Moore*'s subsequent discussion of conflict preemption as mere dicta is insupportable.

different devices introduced gradually over time." *See* 120 S. Ct. at 1922. On this latter point, this Court's holding was narrowly confined to the particular regulation at issue, and has no bearing on whether a no-propeller-guard claim like petitioner's would conflict with the U.S. Coast Guard's regulatory *in*action regarding propeller guards.[2]

At the same time, in one key respect that goes unmentioned by OMC, *Geier* confirms that the Texas Supreme Court got it exactly right. In *Geier*, the United States had filed an *amicus curiae* brief arguing that no-airbag claims would conflict with federal regulatory purposes. This Court ultimately deferred to that position, holding that the United States' interpretation of the preemptive effect of agency action is entitled to "special weight." *Geier*, 120 S. Ct. at 1926, 1928. What OMC conveniently fails to emphasize is that, in *Lewis v. Brunswick*, the United States filed an *amicus curiae* brief arguing that claims exactly like petitioner's do not conflict with any federal purposes, and thus are not preempted by federal law. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288). Under *Geier*, as well as numerous prior decisions of this Court, *see, e.g., Medtronic v. Lohr, Inc.*, 518 U.S. 470, 496, 505-07 (1996) (majority and concurring opinions), the United States' *amicus* brief in *Lewis* is entitled to deference on this point. To date, however, the Texas Supreme Court stands alone against a host of federal courts of appeals in

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[2] OMC makes much of the fact that *Geier* "made clear that the presence of an express preemption clause does not alter in any way a court's obligation to undertake a full implied preemption analysis," Opp. 19-20, claiming that this holding invalidates *Moore*. As explained above, however, *Moore did* reach the question of implied conflict preemption, and thus its ruling is undisturbed by *Geier*.

holding that no-propeller-guard claims are not preempted by federal law. *See* Pet. App. at 5-6. Thus, not only does *Geier* not discredit *Moore*, but it provides further reason to grant review and accord the United States' authoritative position the deference it deserves.[3]

2. This Court has Not Already Resolved The Preemption Issues Presented in *Lewis*.

Nor is OMC correct in claiming that this Court "has already resolved the preemption issues presented in *Lewis v. Brunswick Corp.*" Opp. at 20-22. To support this argument, OMC selectively quotes from the preliminary questions presented in the *Lewis* petition for *certiorari*, which included

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[3] OMC claims that the United States' position in *Lewis* is not entitled to any weight because (1) the agency itself did not "join[ ] the brief"; and (2) "the Coast Guard has consistently taken the position that the [Act] preempts tort claims like [petitioner's]." Opp. at 18. The first argument is sophistry, as it requires a Court to infer from the absence of a signature that an agency (which is, after all, a part of the United States) actually means something other than what the United States says it means. OMC cites no authority to support this novel theory of agency deference. (Deference to the *Lewis* brief is particularly appropriate, moreover, given that the Coast Guard is *ceding* authority to the states, not trying to claim power for itself. *See Medtronic*, 518 U.S. at 496 (according "substantial weight" to agency position that regulations do not preempt common-law claims)). OMC's second claim simply lacks any evidentiary support, as it is based solely on certain Coast Guard regulations promulgated after the Boat Safety Act's enactment, *see* 36 Fed. Reg. 15764-65 (1971), that granted a blanket exemption from preemption for then-existing state and local laws on recreational boats. *See* Opp. at 18. Contrary to OMC's suggestion, these regulations do not even mention tort claims. There is accordingly no reason to suppose that the Coast Guard ever viewed common-law claims (as opposed to state legislation and regulations) as falling within the scope of the Act's preemption provision.

several generic issues relating to implied preemption. *See* Opp. 21. However, the merits briefs in *Lewis* fully addressed whether no-propeller-guard claims are either expressly preempted by the Boat Safety Act or impliedly preempted by the U.S. Coast Guard's decision not to regulate propeller guards. *See Lewis v. Brunswick Corp.*, No. 97-288.[4]

The express preemption question has arguably been answered by *Geier*, which held that a similarly-worded savings clause that explicitly preserves common-law claims precludes a finding of express preemption under the Motor Vehicle Safety Act. *See supra* at 3. However, as explained above, *Geier* did not even come close to answering the implied conflict preemption question presented in this case, except insofar as it reaffirmed that the United States' position on the preemptive effect of agency actions is entitled to deference – a teaching that the lower court chose to ignore.[5]

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[4] The Solicitor General's brief in *Lewis* included the following Question Presented:

> Whether petitioners' state common law tort action, based on the respondent's failure to install a propeller-guard on a motorboat, is preempted by the Federal Boat Safety Act of 1971 . . . or by the decision of the Secretary of Transportation to take no regulatory action to require the installation of propeller guards on recreational boats.

Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288) at (I).

[5] OMC suggests that this Court's ruling in *United States v. Locke*, 529 U.S. 89, 120 S. Ct. 1135 (2000), may have helped resolve this issue, insofar as it held that there is no presumption against preemption of state positive law regulation of ocean-going oil tankers involved in international maritime commerce. *See* Opp. at 13. As explained in our petition, however,

Nor can it reasonably be said (as does OMC) that this case is not worthy of review because the lower court decision was "extremely narrow." Opp. at 14-15. In reality, the Fifth Circuit's decision could have extremely broad ramifications given that it affords preemptive effect to an agency's decision *not to issue regulations* governing a particular safety device. Under this approach, the mere fact that an agency decides to study a particular device or technique, but ultimately decides for whatever reason not to issue any federal regulations, could automatically wipe out the rights of citizens to seek compensation through the common law. If this result could obtain under a statute like the Boat Safety Act, where Congress took pains to make clear that common-law claims were to be expressly *preserved* and where the United States itself has taken the position that tort claims do not conflict with federal law, then it is hard to imagine where the lower court's reasoning could find a logical stopping point. It is therefore disingenuous to assert that, due to the "narrow[ness]" of its reasoning, the Fifth Circuit's decision is not worthy of review.

3. OMC's Bankruptcy is Not a Reason to Deny the Writ.

Finally, OMC cites its recent filing of Chapter 11 bankruptcy as an independent reason why the writ should be denied. Opp. 22-24. Notably, OMC does not attempt to claim that this Court lacks jurisdiction to hear this case, or that the automatic stay provision of 11 U.S.C. § 362(a)(1) precludes this Court from considering the merits of this petition. Rather, it

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there are myriad reasons why it would make no sense to apply *Locke*'s holding to a case involving a small recreational vessel on local waters. *See* Pet. at 22-23.

argues: (1) that Lady should have filed a motion for relief from the automatic stay in the United States Bankruptcy Court for the Northern District of Illinois (Opp. 22); and (2) that its bankruptcy filing renders this case an "exceedingly poor vehicle" for this Court's review because a remand to the district court for a trial on the merits would be "extremely disruptive to OMC's efforts to reorganize." Opp. at 23. Neither claim is worthy of serious consideration.

First, OMC's argument that the petition should be denied because Mr. Lady has not yet moved for relief from the stay is diversionary. Petitioner has not yet sought relief from the bankruptcy stay because this Court ordered OMC to file an opposition to the petition for *certiorari*.[6] There was no reason to take any further action at this stage given that the proceedings in this Court are ongoing, and could effectively terminate petitioner's litigation against OMC. Petitioner will, however, seek relief from the stay when and if such action becomes appropriate.

OMC's claim that review is not warranted because ongoing litigation following a remand from this Court would be "disruptive and distracting" is equally weak. If review is granted here, this Court will simply decide whether petitioner's claims are subject to a preemption defense, not whether no-propeller-guard claims should succeed on the merits. What

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[6] On January 16, 2001, OMC filed a notice of waiver of its right to file an opposition in this proceeding, citing its recent filing of Chapter 11 bankruptcy. The was the first time that petitioner was made aware of the bankruptcy petition, which was filed on December 22, 2000 (the same day our petition for *certiorari* was filed with this Court). By letter dated January 23, 2001, the Clerk of this Court directed OMC to answer the petition notwithstanding the bankruptcy proceedings.

happens *after* this Court rules is irrelevant to the question of whether this case presents a solid vehicle for review of the preemption question. In addition, if petitioner succeeds here, and this Court remands the case for further proceedings, OMC will have ample opportunities to seek to enforce the bankruptcy stay in accordance with applicable standards. Thus, the "distraction" posited by OMC is an argument appropriately made later, if at all, and to the courts below, not this Court.

At bottom, OMC's bankruptcy-based arguments are nothing more than an attempt to avoid any future liability for no-propeller-guard claims like petitioner's. As noted above, the vast majority of federal courts of appeals have concluded that such claims are preempted by the Coast Guard's regulatory inaction. Unless and until the preemption question is decided by this Court, OMC may not have to compensate any of its propeller-guard victims, either in or out of bankruptcy. There is no need to wait for "another opportunity" to decide the issue presented here, and fundamental fairness counsels in favor of this Court deciding it now.

CONCLUSION

This petition for a writ of *certiorari* should be granted.

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